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70



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2563
No. 12115

United States
Court of Appeals

for the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRY-
DOCK CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation District
of the Bureau of Employees' Compensation,
Federal Security Agency, and HENRY MA-
NEKE and MOLLIE MANEKE, Parents of
Adrien Maneke, Deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

No. 12115

United States
Court of Appeals
for the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRY-
DOCK CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation District
of the Bureau of Employees' Compensation,
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NEKE and MOLLIE MANEKE, Parents of
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	17
Cost Bond on	13
Designation of Record on (DC).....	16
Notice of	12
Order Extending Time to Docket.....	16
Order Granting Motion for Extension of Time to File Transcript and Docket.....	74
Statement of Points and Designation of Record on (USCA)	75
Certificate of Clerk to Transcript of Record on Appeal	17
Claim File of the Federal Security Agency, Bu- reau of Employees Compensation	18
Answer of Insurance Company US-215 to Claim for Compensation of Molly Maneke	22
Answer of Insurance Company US-215 to Claim for Compensation of Henry Maneke	25
Certification of Commissioner	18

Claim File of the Federal Security Agency, Bureau of Employees Compensation—(Cont'd)	
Claim for Compensation of Mollie Maneke...	23
Claim for Compensation of Henry Maneke...	20
Compensation Order of February 19, 1948....	26
Transcript of Testimony	29
Witnesses:	
Maneke, Clarence	
—direct	50
—recalled, direct	60, 70
Maneke, Henry	
—direct	31
—recalled, direct	59
Maneke, Mollie	
—direct	63
Exhibit A—Claim for Compensation of Henry Maneke	20
Exhibit B—Claim for Compensation of Mollie Maneke	23
Complaint for Injunction	2
Exhibit A—Compensation Order—Award of Death Benefit—Case No. 181-1780	8
Cost Bond on Appeal	13
Designation of Contents of Record on Appeal (DC)	16
Designation of Record, Statement of Points and (USCA)	75

	PAGE
Minute Order—Dec. 6, 1948—Order Granting Motion for Extension of Time to File Trans- cript and Docket Cause	74
Motion to Dismiss Complaint.....	10
Names and Addresses of Attorneys.....	1
Notice of Appeal	12
Order Dismissing Complaint.....	11
Order Extending Time to Docket Record on Ap- peal	16
Statement of Points and Designation of Record on Appeal (USCA)	75

NAMES AND ADDRESSES OF ATTORNEYS

For Complainants and Appellants:

LEONARD, HANNA & BROPHY,
DONALD R. BROPHY, ESQ.,
IVAN A. SCHWAB, ESQ.,
465 California St.,
San Francisco 4, California.

For Respondent and Appellee,
Warren H. Pillsbury, Deputy Commissioner:

FRANK H. HENNESSY, ESQ.,
United States Attorney,
422 Post Office Building,
San Francisco 1, Calif.

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 27965-R

INDUSTRIAL INDEMNITY EXCHANGE, and
GENERAL ENGINEERING AND DRY-
DOCK CORPORATION,

Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and HENRY MANEKE and MOLLIE MANEKE, Parents of ADRIAN MANEKE, Deceased,

Respondents.

COMPLAINT FOR INJUNCTION

Complainants complain of Respondents above named and allege as follows:

I.

That complainant General Engineering and Dry Dock Corporation is, and was at all times mentioned herein, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do business in the State of California.

II.

That the complainant Industrial Indemnity Exchange is, and was at all times herein mentioned,

an inter-insurance exchange, organized and existing under and by virtue of the laws of the State of California, and authorized to conduct a workmen's compensation insurance business in the State of California. [1 *]

III.

That the respondent Warren H. Pillsbury is, and was at all times herein mentioned, the Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and that said Thirteenth Compensation District includes the State of California; that as said Deputy Commissioner, the said Warren H. Pillsbury administers the provisions of that certain Act of Congress known as the "Longshoremen's and Harbor Workers' Compensation Act" (44 Stat. 1424, as amended 33 U. S. Code 901 et seq).

IV.

That the respondents Henry Maneke and Mollie Maneke are the persons in whose favor an Award of Death Benefit was made, as hereinafter related, and they are beneficially interested in this proceeding and for that reason are made parties respondent.

V.

That on the 26th day of June, 1947, Adrian Maneke was in the employ of General Engineering and Dry Dock Corporation at Alameda, California, as a painter and engaged in ship servicing opera-

* Page numbering appearing at foot of page of original certified Transcript of Record.

tions on a completed vessel on navigable waters of the United States; that said Adrian Maneke then and there sustained injury arising out of and in the course of his employment, resulting in immediate death, when he was thrown from a painters' float by a sudden movement of the propellor of the ship and was drowned.

VI.

That on the 26th day of June, 1947, the Industrial Indemnity Exchange, under and by virtue of a contract with the General Engineering and Dry Dock Corporation, insured said employer against the liability imposed upon it by the Longshoremen's and Harbor Workers' Compensation Act.

VII.

That said Henry Maneke and Mollie Maneke, the parents of the said Adrian Maneke, filed claims with the respondent Warren H. [2] Pillsbury, as Deputy Commissioner, against the complainants above named, for the purpose of recovering benefits under the Longshoremen's and Harbor Workers' Compensation Act by reason of the death of their son, Adrian Maneke; that the matter came on regularly for hearing before said Deputy Commissioner, and thereafter, by transfer pursuant to Section 19(g) of said Act, a hearing was held before Leonard C. Brown, Deputy Commissioner for the Tenth Compensation District; that the issues were joined and evidence, both oral and documentary, was received and the matter submitted for decision by said respondent Warren H. Pillsbury.

VIII.

That thereafter, on the 19th day of February, 1948, the respondent Warren H. Pillsbury, as Deputy Commissioner, filed in his office and served upon the parties to said proceeding a Compensation Order—Award of Death Benefit; that a copy of said Compensation Order—Award of Death Benefit is attached hereto as Exhibit A and made a part hereof.

IX.

That no proceedings for the suspension or setting aside of said Compensation Order — Award of Death Benefit filed February 19, 1948, have ever been instituted as provided in sub-division (b) of Section 21 of said Act, or elsewhere, or at all. That under the provisions of said Act the said compensation order became effective when filed on February 19, 1948, and except for these proceedings to suspend or set aside said order would become final at the expiration of thirty days after said February 19, 1948.

X.

That said Compensation Order—Award of Death Benefit is not in accord with law in finding the respondents Henry Maneke and Mollie Maneke to be legally dependent upon the deceased employee on June 26, 1947, and entitled to a death benefit at the rate of \$9.38 a week payable to claimant Henry Maneke, and \$9.38 a week payable to Mollie Maneke, beginning with July 26, 1947, and continuing until the further [3] order of the Deputy Commis-

sioner, when the evidence shows without contradiction:

(a) That said Henry Maneke and Mollie Maneke had received no contributions for support from the deceased employee for five months prior to his fatal injury on June 26, 1947.

(b) That at all times since February, 1947, to the date of hearing on October 21, 1947, said Henry Maneke and Mollie Maneke have not been dependent for support upon any source outside of their own income.

XI.

That the complainants have no adequate nor any remedy other than these proceedings which are brought pursuant to the provisions of Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, which provides that if not in accordance with law a compensation order may be suspended or set aside in whole or in part through injunction proceedings brought by any party in the interest against the Deputy Commissioner making the order.

XII.

That all of said proceedings before said Deputy Commissioner are contained in a file of said Deputy Commissioner under Claim No. 2906, Case No. 181-1780, together with the testimony of witnesses heard by the said Deputy Commissioner Leonard C. Brown at the hearing held before him.

That said Deputy Commissioner Warren H. Pillsbury should be required to file with the clerk

of this court, at a time to be fixed by the court, a certified copy of all proceedings had in the case, together with all exhibits, transcripts of testimony, letters and documents of every nature and description received by said Deputy Commissioner in connection with said claim.

Wherefore, complainants pray that process in due form of law according to the course of this Honorable Court may issue and that [4] respondents may be cited to appear and answer all and singularly the matters hereinbefore set forth and that the order of said Deputy Commissioner filed February 19, 1948, be set aside and declared a nullity and that a mandatory injunction be issued herein setting aside and restraining enforcement of said purported Order dated February 19, 1948, and that the respondents be permanently enjoined from making or attempting to make any further orders with respect to said proceedings; and for such other, further and different relief as to the court may seem justified, and for costs incurred herein.

Dated March 19, 1948.

LEONARD, HANNA and BROPHY;
IVAN A. SCHWAB,

Attorneys for Complainants. [5]

EXHIBIT A

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Henry Maneke and Mollie Maneke, Parents of Adrian Maneke, deceased, against General Engineering and Dry Dock Corp., Employer. Industrial Indemnity Exchange, Insurance Carrier.

COMPENSATION ORDER
AWARD OF DEATH BENEFIT

Case No. 181-1780—Claim No. 2906

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

That on the 26th day of June, 1947, Adrian Maneke, son of the claimants above mentioned, was in the employ of the employer above named at Alameda, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Industrial Indemnity Exchange; that on said day the said employee while performing services for the employer as a painter and engaged in

ship servicing operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in his immediate death as follows: While on a painting float at the after end of the ship he was thrown by a sudden movement of a wheel into the water and was drowned; that the average weekly wages of the claimant herein at the time of his [6] injury amounted to the sum of \$61.60; that claimants herein, Henry Maneke, born February 26th, 1891 and Mollie Maneke, born March 10th, 1894, are the father and mother of the said employee and were dependent upon him to a substantial extent for support at the time of his death; that they are entitled to a death benefit at the rate of 25 per cent of the statutory average weekly wages of the employee, amounting to \$9.38 a week each beginning with June 26th, 1944 during their dependency or until the further order of the Deputy Commissioner.

Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, General Engineering and Dry Dock Corporation, and the insurance carrier, Industrial Indemnity Exchange, shall pay to the claimant compensation as follows:

To the claimant Henry Maneke the sum of \$9.38 a week payable in installments each two weeks or monthly at his election beginning with June 26th,

1947 until the further order of the Deputy Commissioner.

To claimant Mollie Maneke the sum of \$9.38 a week payable in installments each two weeks or monthly at her election beginning with June 26th, 1947 until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 19th day of February, 1948.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner.

[Endorsed]: Filed March 19, 1948.

[7]

[Title of District Court and Cause.]

MOTION OF RESPONDENT WARREN H.
PILLSBURY, DEPUTY COMMISSIONER,
TO DISMISS COMPLAINT.

Comes now the defendant, Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees Compensation, Federal Security Agency, by his Attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Complaint herein after review of the compensation order filed herein for the following reasons.

1. That the Complaint filed herein does not state a cause of action and does not entitle plaintiffs or either of them to any relief, nor does said Complaint state a claim against the defendant War-

ren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

2. That it appears from the Complaint, including the transcripts of testimony taken before the Deputy Commissioner on file herein, that the findings of fact made by the Deputy Commissioner in the compensation order filed by him on February 19, 1948 complained of in the Bill of Complaint, were supported by evidence and under the law said findings of fact should be regarded as final and conclusive.

3. That it appears from the Complaint, including said transcripts of testimony, that said compensation order complained of is in all respects in accordance with law.

4. For such other good and sufficient reasons as may be shown. [8]

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney.

Attorneys for Respondent Warren H. Pillsbury,
Deputy Commissioner.

[Endorsed]: Filed May 14, 1948.

[9]

[Title of District Court and Cause.]

ORDER DISMISSING COMPLAINT

It is Ordered that the Respondent's motion to dismiss the complaint for injunction herein filed be

and the same hereby is granted and said complaint is hereby dismissed.

Dated July 6th, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 6, 1948. [10]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that General Engineering and Drydock Corporation, and Industrial Indemnity Exchange, an inter-insurance exchange, complainants in the above entitled action, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that order dismissing complainants' complaint for injunteion and from that order granting the respondents motion to dismiss the complaint for injunction issued in favor of the respondents against complainants, and from the whole of said judgment and each and every part thereof on questions of law and the dismissal of said complaint entered herein on the Sixth day of July, 1948 and filed herein on the Sixth day of July, 1948.

DONALD R. BROPHY,
Attorney for Complainants.

Dated at San Francisco this 5th day of August, 1948. [11]

(Acknowledgment of Service.)

[Endorsed]: Filed August 5, 1948. [12]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents, that United Pacific Insurance Company, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized and qualified to do business within the State of California, for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America or of the State of California, is held and firmly bound unto Warren H. Pillsbury, as Deputy Commissioner of the Federal Security Agency, Bureau of Employees' Compensation for the 13th Compensation District, and unto his successors in office, and unto Henry Maneke and Mollie Maneke, in the penal sum of Two Hundred and Fifty Dollars (\$250.00) for the payment of which, [13] well and truly to be made unto the said respondents or their successors and personal representatives respectively, and said United Pacific Insurance Company hereby binds itself, its successors and assigns firmly by these presents.

The condition of the foregoing obligation and undertaking is such, that whereas the above-named complainants, General Engineering and Drydock Corporation and Industrial Indemnity Exchange, in the above-entitled suit have appealed and are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the denial of motion and order made and entered

in the above-entitled court and cause upon July 6, 1948;

Now, therefore, if the said General Engineering and Drydock Corporation and the Industrial Indemnity Exchange shall prosecute their said appeal to effect and answer all costs which may be awarded or adjudged against them or either of them if they fail to make good their said appeal, then this obligation shall become void; otherwise to remain in full force and effect, and in case of any breach of said condition, it is expressly agreed that the said District Court may, upon notice to this obligor, of not less than ten days, proceed summarily in the above-entitled suit to ascertain the amount which it is bound to pay on account of such breach, and render judgment against this obligor therefor and award execution thereon.

In Witness Whereof, these presents have been executed by the attorney in fact of said obligor thereunto duly authorized and the seal of said obligor affixed, upon the day and year hereinabove written.

The premium charged for this bond is \$10.00 per annum.

(Seal)

UNITED PACIFIC

INSURANCE COMPANY,

By /s/ M. HENDERSON,

Attorney in Fact.

[14]

State of California,
City and County of San Francisco—ss.

On this 5th day of August, 1948, before me, Alfred D. Martin, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared M. Henderson known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of United Pacific Insurance Company and acknowledged to me that she subscribed the name of United Pacific Insurance Company thereto as principal, and her own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco the day and year in this certificate first above written.

/s/ ALFRED D. MARTIN,

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires May 16, 1949.

Examined and recommended for approval as
provided in Rule 8.

/s/ D. R. BROPHY,

Attorney for Complainants.

I hereby approve the foregoing bond.

Dated this 5th day of August, 1948.

MICHAEL J. ROCHE,

United States District Judge for the Northern
District, Southern Division.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Complainants hereby designate that the whole of the record, proceedings, and evidence be contained in the record on appeal herein and specifically request this Court to require the respondent, Warren H. Pillsbury, to certify as part of the record the sworn interrogatories of Conn Winfrey, covering in particular the actual bank records of the First National Bank of Lebanon, Missouri, showing the deposits and balances of Henry Maneke and Molly Maneke between the dates November 14, 1946 and December 9, 1947, which records were produced and available to Deputy Commissioner Leonard C. Brown, who presided at the hearing at Lebanon, Missouri on October 21, 1947 but which were not included in the transcript of testimony of the proceeding held that date [16] before said Deputy Commissioner.

D. R. BROPHY,

Attorney for Complainants.

Dated at San Francisco this 5th day of August, 1948.

[Endorsed]: Filed August 5, 1948.

[17]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to

and including October 24, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated September 14, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Sept. 14, 1948. [18]

District Court of the United States,
Northern District of California.

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 18 pages, numbered from 1 to 18, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Industrial Indemnity Exchange, et al. vs. Warren H. Pillsbury, Deputy Commissioner, etc., et al, No. 27965-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Three Dollars and Ninety Cents (\$3.90) and that the said amount has been paid to me by the Attorneys for the appellants herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 26th day of November, A. D. 1948.

(Seal) C. W. CALBREATH,
Clerk.

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District

Claim No. 2906

Case No. 181-1780

In the Matter of the claim for compensation under
the Longshoremen's and Harbor Workers' Com-
pensation Act.

HENRY MANEKE and MOLLIE MANEKE,
Parents of Adrian Maneke, deceased,
Claimants.

against

GENERAL ENGINEERING AND DRY DOCK
CORP.,

Employer.

INDUSTRIAL INDEMNITY EXCHANGE,
Insurance Carrier.

CERTIFICATION

This is to certify that I am the duly appointed,
qualified and acting Deputy Commissioner of the
Federal Security Agency, Bureau of Employees
Compensation under the Longshoremen's and Har-
bor Workers' Compensation Act for the Thirteenth

Compensation District, comprising the State of California and other portions of the United States;

That there has recently been pending before me as said Deputy Commissioner, claims for compensation under said Act of Henry Maneke and Mollie Maneke, Parents of Adrian Maneke, deceased, against General Engineering and Dry Dock Corp., employer, and Industrial Indemnity Exchange, insurance carrier, my file No. 181-1780.

That the attached are originals or true and correct copies of pleadings, transcript of testimony, exhibits, and decision in said file as listed below, being a copy of the entire claim file therein as far as relevant to a review of the above proceeding:

1. Claim for Compensation of Molly Maneke, US-263, copy.

2. Claim for Compensation of Henry Maneke, US-263, copy.

3. Answers of Insurance Company US-215s to Claims for Compensation of Molly Maneke and Henry Maneke.

4. Compensation Order of February 19, 1948, copy.

5. Transcript of Testimony with attached Exhibits "A" and "B" Claims for Compensation of Molly Maneke and Henry Maneke.

Given under my hand at San Francisco, California this 26th day of March, 1948.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner,
13th District.

EXHIBIT A

Form US-263

UNITED STATES EMPLOYEES'
COMPENSATION COMMISSION

Office of Deputy Commissioner Warren H. Pillsbury. Administering Longshoremen's and Harbor Workers' Compensation Act.

Claim for Compensation in Death Cases by
Dependents Other Than Widow and
Children of Deceased

(Each dependent or representative must file
individual claim)

I hereby make claim for compensation under section 9 of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, and in support of my claim make answer to the following questions, unless otherwise stated, relating to the time of the death of deceased:

1. My claim arises out of the death of Adrian Maneke at Alameda, California.

2. Who died on 26th day of June, 1947, as a result of injury sustained on 26th day of June, 1947, in the employ of General Engineering and Dry Dock Corporation of Alameda, California.

3. What was your relationship to deceased? Mother.

4. I was born on the 10th day of March, 1894.

5. Were you wholly or partially dependent upon the deceased for your support? Partially.

6. If partially dependent, to what degree? \$300.

7. What other sources of income do you have? Husband worked part time at stave mill and earned \$800.00 in 1946; unemployed at present.

8. I own joint property as follows: Real estate, assessed value \$5,000, from which I receive an income of (None) annually and on which there is an indebtedness of (none); notes, stocks, bonds or mortgages; money in bank (none) from which I received (none) annually. State other sources of income, if any. (State fully.)

9. Is deceased survived by any other dependents? Yes. If so, name them and state relationship of each to deceased: Henry Maneke, Lebanon, Mo., father; date of birth 2-26-1891.

10. Name and address of last physician or hospital Mark L. Emerson, M.D. per FCO, Oakland, Calif.

11. Name of undertaker: Grant D. Miller. Address: 2850 Telegraph Ave, Oakland. F. H. Gilbert, Dixon, Mo.

12. Amount of undertaker's bills, \$700. Amount paid, if any, \$541.

13. By whom paid Clarence Maneke, 201 South Olive, Rolla, Mo.

/s/ MOLLIE MANEKE,

/s/ HENRY MANEKE,

Lebanon, Mo.

AFFIDAVIT

State of Mo.,

County of Laclede—ss.

On this 19th day of July, A. D. 1947, personally appeared before me the above named Henry Man-

eke and made oath that the answers by him above named and subscribed are true.

(Seal) /s/ ARTHUR E. HALZOG,
 Notary Public,
 Lebanon, Mo.

Form US-215

ANSWER OF EMPLOYER OR INSURANCE
 CARRIER TO EMPLOYEE'S CLAIM FOR
 COMPENSATION

Molly Maneke, Claimant vs. General Engineering and Dry Dock Corporation, Employer. Industrial Indemnity Exchange, Insurance Carrier.

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is admitted that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is admitted admitted that the relationship of employer and employee existed at the time of the injury.

4. It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that notice of injury was given employer as specified in application.

6. It is (admitted denied) that applicant was

permanently disabled to the extent stated in application.

7. It is (admitted denied) that applicant was temporarily disabled for the period stated in application.

8. It is admitted that the rate of wages was in excess of \$37.50 weekly.

9. Dependency is denied.

INDUSTRIAL INDEMNITY
EXCHANGE,
/s/ D. R. BROPHY.

EXHIBIT B

Form US-263

CLAIM FOR COMPENSATION IN DEATH
CASES BY DEPENDENTS OTHER THAN
WIDOW AND CHILDREN OF DECEASED

(Each dependent or representative must file
individual claim)

I hereby make claim for compensation under section 9 of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, and in support of my claim make answer to the following questions, unless otherwise stated, relating to the time of the death of deceased:

1. My claim arises out of the death of Adrian Maneke at Alameda, California.

2. Who died on 26th day of June, 1947, as a result of injury sustained on the 26th day of June, 1947, in the employ of General Engineering and Dry Dock Corporation of Alameda, California.

3. What was your relationship to deceased? Father.

4. I was born on the 26th day of February, 1891.

5. Were you wholly or partially dependent upon the deceased for your support? Partially.

6. If partially dependent, to what degree? \$300.

7. What other sources of income do you have? Last year worked part time at stave mill and earned \$800 at present physically unable to work.

8. I own joint property as follows: Real estate, assessed value \$5,000, from which I receive an income of (none) annually and on which there is an indebtedness of (none); notes, stocks, bonds or mortgages; money in bank \$500 from which I received (none) annually. State other sources of income, if any. (State fully.) Produce nets \$20.00 a month for 6 months each year.

9. Is deceased survived by any other dependents? Yes. If so, name them and state relationship of each to deceased:

Molly Maneke, Lebanon, Mo. Relationship mother; date of birth Nov. 10, 1894.

10. Name and address of last physician or hospital Mark L. Emerson, M.D. per FCO, Oakland, Calif.

11. Name of undertaker Grant D. Miller. 2850 Telegraph Ave., Oakland, Calif. F. H. Gilbert, Dixon, Mo.

12. Amount of undertaker's bills, \$700. Amount paid, if any, \$541.

13. By whom paid, Clarence Maneke 201 So.
Olive St., Rolla, Mo.

/s/ HENRY MANEKE,

/s/ MOLLY MANEKE,

Lebanon, Mo.

AFFIDAVIT

State of Mo.,

County of Laclede—ss.

On this 19th day of July, A. D. 1947, personally
appeared before me the above named Molly Ma-
neke and made oath that the answers by her above
named and subscribed are true.

(Seal) /s/ ARTHUR E. HARLZOG,

Notary Public,

Lebanon, Mo.

Form US-215

ANSWER OF EMPLOYER OR INSURANCE
CARRIER TO EMPLOYEE'S CLAIM FOR
COMPENSATION

Henry Maneke, Claimant vs. General Engineer-
ing and Dry Dock Corporation, Employer. Indus-
trial Indemnity Exchange, Insurance Carrier.

The employer or insurance carrier above named
for answer to the claim respectfully shows:

1. It is admitted that applicant sustained an
injury on or about the date set forth in the appli-
cation.

2. It is admitted that both the employer and
employee were subject to the Longshoremen's and

Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of the injury.

4. It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that notice of injury was given employer as specified in application.

6. It is (admitted denied) that applicant was permanently disabled to the extent stated in application.

7. It is admitted that applicant was temporarily disabled for the period stated in application.

8. It is admitted that the rate of wages was in excess of \$37.50 weekly.

9. Dependency is denied.

INDUSTRIAL INDEMNITY
EXCHANGE,
/s/ D. R. BROPHY.

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District
[Title of Cause.]

COMPENSATION ORDER—AWARD OF
DEATH BENEFIT

Case No. 181-1780

Claim No. 2906

Such investigation in respect to the above entitled claim having been made as is considered

necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

That on the 26th day of June, 1947, Adrian Maneke, son of the claimants above mentioned, was in the employ of the employer above named at Alameda, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Industrial Indemnity Exchange; that on said day the said employee while performing services for the employer as a painter and engaged in ship servicing operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in his immediate death as follows: While on a painting float at the after end of the ship he was thrown by a sudden movement of a wheel into the water and was drowned; that the average weekly wages of the claimant herein at the time of his injury amounted to the sum of \$61.60; that claimants herein, Henry Maneke, born February 26th, 1891 and Mollie Maneke, born March 10th, 1894, are the father and mother of the said employee and were dependent upon him to a substantial extent for support at the time of his death, that they are entitled to a death benefit at the rate

of 25 per cent of the statutory average weekly wages of the employee, amounting to \$9.38 a week each beginning with June 26th, 1944 during their dependency or until the further order of the Deputy Commissioner.

Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, General Engineering and Dry Dock Corporation, and the insurance carrier, Industrial Indemnity Exchange, shall pay to claimant compensation as follows:

To claimant Henry Maneke the sum of \$9.38 a week payable in installments each two weeks or monthly at his election beginning with June 26th, 1947 until the further order of the Deputy Commissioner.

To claimant Mollie Maneke the sum of \$9.38 a week payable in installments each two weeks or monthly at her election beginning with June 26th, 1947 until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 19th day of February, 1948.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

Federal Security Agency—Bureau of Employees'
Compensation Tenth Compensation District.

Hearing before Leonard C. Brown, Deputy Commissioner at U. S. Postoffice, Lebanon, Missouri, Tuesday, October 21, 1947, 3:00 p.m.

Case No. 181-1780

[Title of Cause.]

On this date, at 3:00 p.m., continued from 9:30 a.m., before Leonard C. Brown, Deputy Commissioner of the Tenth Compensation District, at U. S. Postoffice, Lebanon, Missouri, claimants appearing in person and by Mr. W. I. Mayfield, Attorney, of Lebanon, Missouri, and the Employer and Insurance Carrier represented by Mr. Paul J. Dillard, Attorney, Lebanon, Missouri, this matter comes on for hearing on petition of claimants, Henry Maneke and Mollie Maneke, for death benefits on account of the death of one Adrian Maneke at Alameda, California, on June 26th, 1947 as a result of drowning while employed as a painter by General Engineering and [1 *] Dry Dock Corporation on the steamship Jacob S. Mansfeld, which was then afloat in the navigable waters of the Oakland Estuary, said drowning and death arising out of and in the course of said employment. Both Employer and Employee were subject to the terms of the Longshoremen's and Harbor Workers' Compensation Act, and the Employer was insured against liability thereunder by the Industrial Indemnity Exchange. The wages of the employee were in excess of the maximum of \$37.50 per week.

That no compensation has been paid. The burial of the employee was paid for by the employee's brother, Clarence Maneke, in a sum in excess of \$200.00, and no part of this has been refunded by the employer or insurance carrier. This proceeding has been transferred from the Thirteenth Compensation District, where the accident occurred, to the Tenth Compensation District, with the approval of the above named Bureau, for action in accordance with Section 19-G of the Longshoremen's Act.

Deputy Commissioner Brown: Mr. Dillard, just what are the issues that are being raised in this matter?

Mr. Dillard: The issue is the dependency benefits that were given to Henry Maneke and Mollie Maneke during their lifetime by the deceased, and the present dependency of the said Henry Maneke and Mollie Maneke for benefits under the Longshoremen's and Harbor Workers' Compensation Act.

Deputy Commissioner Brown: Now, you will enter this claim of Henry Maneke as Exhibit "A" and the one of Mollie Maneke as Exhibit "B".

(Said exhibits are hereto attached and made a part of [2] this transcript.)

[Printer's Note]: Exhibits A and B are identical to Forms 263 set out in full at pages 20 and 23 of this printed Record.

HENRY MANEKE,

claimant herein, being first duly sworn by the Deputy Commissioner, testified as follows, to-wit:

(Testimony of Henry Maneke.)

Direct Examination

By Deputy Commissioner Brown:

Q. Will you state your name, please?

A. Henry Maneke.

Q. And your address?

A. Lebanon, Missouri.

Q. Do you have any local address?

A. No, Lebanon, Missouri, is all I have.

Q. You are on an R.F.D. A. R.F.D. 1.

Q. And what box number?

A. I haven't got no box number, just Route 1 is all it is.

Q. You are the father of Adrian Maneke?

A. Yes, sir.

Q. How long have you been living here near Lebanon? A. Oh, three year.

Q. Three years? A. Yes, sir.

Q. Where was Adrian living during that time—well, during the last year of his life, rather?

A. Well, he made his home at our place, but he worked at Kansas City, and then he went to California—worked at California.

Q. Now, he was drowned on the 26th of June, 1947? A. Yes, I think so; yes.

Q. Where was he at work in June of 1946?

A. Well, I suppose he was at Kansas City—1946? He was [3] at Kansas City—worked at Kansas City.

Q. He was there in 1946?

A. I don't know that he was there in June; he might have been at home. You see, he come

(Testimony of Henry Maneke.)

home and stayed a week or two, but he was working at Kansas City.

Q. Who was he at work for?

A. Well, he worked for the Ford Motor Company and they laid him off there, and then he worked for General Motors, and then he worked for some other place there where they made these here gears.

Q. Made what?

A. Where they made these Alemite gears, but he didn't work there very long, he just worked there until he got a General Motors job.

Q. When did he go to California?

A. Well, along about some time in January.

Q. In 1947? A. Of 1947, yes.

Q. How continuous work had he had from June to January—June of 1946 to January of 1947?

A. Well, he worked steady.

Q. How often did he come home?

A. Well, when he was at Kansas City he come home about every two weeks.

Q. How long would he stay?

A. Well, he would get in there about Friday night or maybe Saturday morning and go back Sunday night. That is, when he quit Kansas City he came home maybe a week or two before he went to California. [4]

Q. Do you know what wages he made with the Ford Motor Company?

A. Well, no, I don't know just exactly, but he got over a dollar an hour, I think, there at General Motors.

(Testimony of Henry Maneke.)

Q. And how many hours a week—I am not talking about General Motors, I said Ford?

A. Oh, about 40 hours a week, I think that is what he got; then he made a little overtime.

Q. He had to pay board and room up there at Kansas City?

A. He had to pay board and room up there.

Q. During the time that he was working in Kansas City did he make any contribution toward your household expenses?

A. Well, yes, he helped me fix my barn up, and he helped us with—we rebuilt a room there and helped fix this and the basement.

Q. Now, when was this done?

A. Well, this here room and this basement was all repaired at the time he was in California, and just got done just, oh, a few weeks before he got drowned, and the barn was fixed, was rebuilt in 1946, along about, the best I remember, maybe in July or August. You see, I didn't work steady on it, I had a carpenter hired.

Q. Well, what contribution did he make toward that improvement?

A. Toward the barn?

Q. Yes.

A. Well, he give me the money to fix it with.

Q. How much did it cost?

A. Well, the house, it cost to [5] repair it—

Q. We are talking about the barn?

A. Oh, the barn? Well, that cost right around \$265.00 or \$270.00.

Q. And he furnished all that money?

(Testimony of Henry Maneke.)

A. He furnished all the money besides what work I could do on it. I helped do part of the work on it. We just had one man hired.

Q. And he furnished the money to pay the man?

A. The man? Well, he furnished the money. Of course, he give it to me and I give it to the man.

Q. Did he also pay for the material or furnish the money for it? A. For the material?

Q. Yes. A. He give me the money.

Q. That was about \$265.00?

A. Well, the best I remember, between \$265.00 and \$275.00. I can't remember. He has given me there between \$265.00 and \$275.00.

Q. When was this improvement made?

A. You mean on the barn?

Q. On what part?

A. It was on my barn there where I live now.

Q. Do you own that place? A. Yes, sir.

Q. You bought it about 3 years ago?

A. Yes, sir.

Q. And is it paid for? A. Yes, sir. [6]

Q. What did it cost you?

A. Oh, between \$5,000.00 and \$6,000.00.

Q. Where did you get the money to guy it with?

A. Well, I had that money.

Q. Before you moved there? A. Yes, sir.

Q. Did you have funds in addition to that?

A. No, sir. I sold another place down there in Maries County.

Q. Well, how often did he come home while he

(Testimony of Henry Maneke.)

was—you say about every two weeks he would come home?

A. When he was in Kansas City, but when he went to California he never come home, that was too far—he worked.

Q. Did he send you this money from Kansas City or did he always bring it?

A. He always brought it when he come home on Saturday nights, he always give it to me then.

Q. Is there anyone outside of your family who knows that he furnished the money for these improvements?

A. Well, nobody but us three.

Q. Did the man who did the work with you know where the money came from?

A. No, he didn't know where the money came from.

Q. Did the man who furnished the materials know where the money came from?

A. No, I bought that from a farmer—well, he wasn't exactly a farmer, he had a farm too, but he works here in town, he had a machine shop here in town. I bought the oak lumber from him.

Q. Well, after he went to California how soon did he begin sending you money?

A. Well, you see, when he went out there he give me enough money here to do me a while.

Q. To do what?

A. Before he left he give me enough money here to last a while.

Q. How much did he give you?

(Testimony of Henry Maneke.)

A. Well, he give me enough to fix all these buildings up.

Q. How much money did he give you?

A. When he left here?

Q. Yes.

A. Oh, he give me \$40.00 or \$50.00 when he left here, but that didn't go with the buildings, that was besides the buildings.

Q. What was that for?

A. Well, to keep things going, what I needed around the house, and some little bills to pay around the house. You see, we didn't get the house finished, we was aiming to do some more work to it and he got drowned. And we also put a kitchen cabinet in the house, and a sink, and we was aiming to run water in the house.

Q. When was that done?

A. Well, the running water hasn't been done yet; he didn't get that finished.

Q. Well, what did you do in the house. I understand the house work was all done after he went to California?

A. Well, all but the kitchen cabinet, that was done before [8] he went to California; the kitchen cabinet was built in there before he went to California.

Q. Did you do any of the work on that?

A. Well, he done a little of the work, yes, but we ordered all the material from Sears-Roebuck & Company.

Q. Already cut to put together?

(Testimony of Henry Maneke.)

A. It was already cut and laid out, all we had to do was set it up and he helped us set it up, and helped us set up the sink, he helped set that up.

Q. That also came from Sears?

A. Yes, it all come from Sears-Roebuck & Company.

Q. But you haven't got it connected up?

A. No, that is all connected up but the running water. You see, he had a well, and I aimed to connect the running water.

Q. What did he do about the house after he went to California—anything?

A. Just built that there room and that basement.

Q. How much did they cost you?

A. With an open porch, we made a closed-in porch, put the windows in and the basement after he went to California.

Q. What did that cost you?

A. Oh, I don't know, between \$120.00 to \$165.00, somewhere along there.

Q. How soon after he went to California did he start sending you money?

A. Oh, I don't know; maybe a month or two.

Q. How did he send you the money?

A. Well, I think it was a postoffice money order.

Q. Was it always in postoffice money orders?

A. Well—when he lived in California?

Q. That is what I mean?

A. When he was in the army he sent some money back, that was postoffice money orders.

(Testimony of Henry Maneke.)

Q. When was he last in the army—when was he discharged?

A. Oh, that was in 1945, I think after Thanksgiving, he come home. You see, he got a 45-day furlough before he come home.

Q. Well, how often after he went to California did he send you money?

A. Well, he just sent once to me after he went to California. You see, he hadn't been out there very long.

Q. He had been there six months, I thought you said? A. He was.

Q. But he only sent you money once?

A. One time.

Q. And when was that?

A. Well, it was about a month or so after he went out there.

Q. What was the amount of it?

A. Fifty dollars, about \$50.00, something like that.

Q. That would be some time in February?

A. Well, I imagine it was February or March, somewheres along there.

Q. Where was he living at that time? [10]

A. Well, he was at that address there, what he gave.

Q. Oakland, California?

A. I think it was where he got drowned, or somewheres there. I forget that address.

Q. Now, this firm that he worked for was working on the Alameda side there. Did he live in Alameda at any time?

(Testimony of Henry Maneke.)

A. I couldn't tell you about where that firm was located.

Q. Well, I am telling you. I know. I am just asking you if he at any time lived in Alameda?

A. Well, I don't know about Alameda.

Q. All right. Now, those are the only remittances or payments or contributions that you can think of—\$275.00—

A. After he went to California?

Q. No, I am talking about the whole picture now. \$275.00 for the barn and \$165.00 on the house?

A. Yes, sir.

Q. And \$50.00 in cash after he went west?

A. Well, then he bought some more furniture for the house; he bought a sweeper, electric sweeper.

Q. When?

A. Well, let's see. I believe that was when he come home from California, I believe that was the winter of 1945 and 1946.

Q. Well, that is too remote. We can consider only the twelve months prior to his death?

A. Well, that was all he bought for the house then there.

Q. Am I right about that: There was \$275.00 for the barn? [11]

A. Yes, sir.

Q. One hundred and sixty-five dollars for the house?

A. House and basement.

Q. And \$50.00 in cash?

A. Well, then he would send money along when he worked at Kansas City, for support money, to buy what we needed.

(Testimony of Henry Maneke.)

Q. In addition to these contributions?

A. Yes, he done that, I don't know, ten or fifteen.

Q. You say he sent that. Did he send it by mail?

A. He brought it to us; mighty near every time he come home he give us money.

Q. In addition to this \$275.00 for the barn?

A. For the barn, and he give us money along for support, to buy stuff, whatever we needed.

Q. Well, what is your best recollection as to the amount of those additional contributions?

A. Oh, he would always give us ten or fifteen or twenty dollars.

Q. When he came home on these two-weeks visits?

A. When he come home, what we needed.

Q. Well, you say ten or fifteen or twenty; that is quite a variable figure. A. Well.

Q. What would it average?

A. Oh, it would average about \$40.00 or \$50.00 a month, I guess, about \$40.00 a month, I guess.

Q. And for that six months that would be \$240.00 additional? [12]

A. And one time I paid a \$25.00 doctor bill; he give me \$25.00 for that; I believe it was in 1946.

Q. What time in 1946?

A. I believe it was.

Q. What time in 1946?

A. I was working in the stave mill in 1946, I

(Testimony of Henry Maneke.)

believe he give me \$25.00 to pay the doctor bill; I paid that to Dr. Harrell.

Q. Was that in the winter of 1946?

A. It was after Christmas of 1946, I believe it was in the winter of 1946.

Q. Well, that is still indefinite. Was it in December of 1946 or in January of 1946?

A. About January or February.

Q. Of 1946. Well, that is too early; we can consider only the period from June of 1946 until his death. A. Oh, that was before then, yes.

Deputy Commissioner Brown: Any questions, Mr. Dillard?

Examination by Mr. Dillard:

Q. How old are you, Mr. Maneke?

A. Fifty-six.

Q. What is the status of your health?

A. What?

Q. What is the status of your health?

A. Well, I had a nervous breakdown in 1944.

Q. You have been a farmer all of your life?

A. I have farmed practically all my life, yes.

Q. Was any of this \$5500.00 that you paid for this farm in Laclede County belonging to Adrian Maneke?

A. No, the farm didn't belong to him.

Q. And the purchase money that went in to buy the farm wasn't any of his either, is that right? A. No, not particularly.

Q. What kind of livestock or what livestock do you have on that farm, Mr. Maneke?

(Testimony of Henry Maneke.)

A. Which—now?

Q. Yes. A. Do you mean at present?

Q. Yes.

A. I have got six Jersey cows.

Q. Do you have any chickens?

A. Oh, we have a few.

Q. What is your income from that farm, Mr. Maneke?

A. Well, by the time I pay the expenses there isn't anything; by the time I pay the feed for the chickens there isn't any income.

Q. What money do you receive from the sale of the produce?

A. Do you mean from the cream or the eggs?

Q. Yes.

A. Well, we sell cream, a can once a week.

Q. Do you recall seeing Mr. Conn Winfrey this morning at 9 o'clock? A. Do which?

Q. You saw Mr. Winfrey this morning at 9 o'clock, didn't you?

A. Winfrey? Who is he?

Q. Cashier of the First National Bank?

A. Yes, I saw him; yes.

Q. And he showed you your ledger sheet?

A. Well, yes, I believe I seen it, yes; I saw it, yes.

Q. Now, do you recall the amount of money that you had in [14] the bank? I am not asking you how much it was.

A. Do you mean right now?

Q. No, no. I mean, you saw from the ledger sheet that you had money in the bank?

(Testimony of Henry Maneke.)

A. Yes, sir.

Q. Do you recall whether any of that money in the bank was money that had been given to you by your son?

A. Well, no, not—that wasn't, no. What is in there now wasn't. Well, yes, hold on. The bonds in there is his'n, he had three bonds.

Q. Now, those bonds, however, were cashed after his death?

A. They was cashed—

Deputy Commissioner Brown: Just answer his question.

A. Yes, they was cashed after his death.

Mr. Dillard: Q. We are not interested in that.

A. But that was his money, what is in there.

Q. You have had money in the First National Bank ever since you have been living in Lebanon?

A. Well, I will say two year, I imagine.

Q. 1944, 1945 and 1946?

A. I don't know whether there was any in 1944, I don't remember now.

Q. I think if you looked at those ledgers you would have seen 1944 and 1945?

A. Well, there might be; I wouldn't say.

Q. Did you look for any stated income from your son each month?

A. What was in the bank—

Q. No, no. Did your son send you any definite amount each [15] month?

A. No, not any definite amount, he didn't.

Q. He, from time to time, just gave you some money, isn't that right?

A. Yes, just cash.

(Testimony of Henry Maneke.)

Q. Did you ever ask him for any money?

A. No, he always give it to me; he knowed what I needed.

Q. Did you ever write to him for any money?

A. No, he knowed what I needed.

Q. Did you expect him to contribute to your support?

A. Yes, sir.

Q. Then you did have some definite idea that he would send you so much each month, is that right?

A. Well, he give it to me.

Q. What?

A. He would give it to me, yes.

Q. Now, I believe you told the Commissioner that you deposited the boy's money from the army in the State Bank?

A. That was in the State Bank, yes.

Q. And of course that is prior to a year and that is not involved in this?

A. No, that was his money. I deposited it there, that was in his name. I don't think I ever had any in the State Bank.

Q. Do you have any letters from him after he was in California with reference to money that he might send to you from time to time?

A. No. Well, he had the \$11.00 check that he sent to me; they might have it at the bank now. It is at the bank now. I haven't never got it out. I guess the State Bank has got that [16] \$11.00 check yet.

Q. Did you write to him while he was in California and ask him for money?

(Testimony of Henry Maneke.)

A. No, I never did write and ask him for money.

Q. Did you have occasion to expect a part of his weekly check or his monthly check?

A. Yes, he told me he would fix it, he would give it to me.

Q. Were those voluntary payments on his part or were they requests from you to him?

A. Well, they were voluntary, and then I requested. You see, I had these two boys—I had these two boys, and this boy was married, and this place what I have got out here, this boy was helping me fix this place up and taking care of it, and at mine and her death he is to get the place, and he had that made up with this boy, he was to get the place after our death and them boys had it made up how they were going to divide that, and this boy, he was helping me fix up the place, was going to get the farm after the death of—

Q. Adrian knew he was going to get the farm?

A. He knew he was going to get the farm after our death.

Q. And the money that he was sending to you to put on the farm was really for his benefit?

A. It would be his'n after our death.

Q. But he was improving his own property?

A. Well, it wouldn't be his'n until after our death.

Q. Just answer the question. He knew that he was going to [17] get the property?

A. Yes, it will be his'n after our death.

(Testimony of Henry Maneke.)

Q. Now, the money that he sent you from time to time, what was the purpose of it—was it to improve the farm?

A. It was to improve the farm for us to live on. He sent it to improve the farm and then for us to live on, when we needed the money to live on, it was to help us, he was to take care of us. That is what he agreed to do—take care of us, seeing that we had what we needed, he was taking care of us.

Deputy Commissioner Brown: Q. You spoke about this boy being married. Do you mean Clarence?

A. That is Clarence. You see, I had a nervous breakdown in 1944, you can ask the doctors there at Dixon, Doctor Gates, he will tell you, and the boy seen after me ever since that. Of course, he was in the army, he couldn't do nothing while he was in the army.

Mr. Dillard: Q. Let me see if I have this straight now. You had a nervous breakdown, you bought this farm for over \$5,000 of your own money?

A. Well, I had a farm down here and I sold it.

Q. Well, I mean, it was your own money that you bought this farm with. And then you had an understanding with your two sons that upon your death and the death of your wife that they should get the farm?

A. The boy in California was to get the farm, he understood it, with this boy here, to take care of us—he had to take care [18] of us.

(Testimony of Henry Manēke.)

Q. All right. Now, I don't understand you. The agreement that you had with the boy in California was this: that to get the farm he was to take care of you and make improvements on the farm from time to time, is that right?

A. Yes, he was going to, but that was up to him.

Q. Well, I know.

A. Yes, he was to make improvements on the farm and give us what we needed to live on and he was to get the farm after our death.

Q. In other words, he was buying the farm subject—

Deputy Commissioner Brown: No, the farm was already bought.

Mr. Dillard: I know, but what I am getting at is this:

Q. He was buying the farm from the agreement that you had with him that he would take the farm upon your death and Mrs. Maneke's death, is that right?

A. And he was to get the farm after our death.

Q. By supporting you and Mrs. Maneke during your life?

A. He was to support us and take care of us, anything we needed to live on, or doctor bills or anything.

Q. He had to do that to get the farm?

A. Well, the farm would be his'n.

Q. Well, that is what I say: he had to do that to get the farm? A. Yes, that's right.

Q. That's right. That's all I have. [19]

(Testimony of Henry Maneke.)

Examination by Deputy Commissioner Brown:

Q. Was there any understanding about any contribution that he might make to his brother Clarence as a part of the estate?

A. Sure, he had that made up with Clarence, the part Clarence was to get.

Q. What part was that?

A. Well, I don't know what that was; they was to fix that up together. You see, Clarence was married and he had to take care of himself, and if there was any left they had that made up together, he had to take care of us and Clarence told him he would get the farm at his death; they had that made in between themselves, how they was going to fix that.

Q. That he would get the farm after your death?

A. Adrian would, yes. Clarence wouldn't get the farm because Adrian was going to take care of us.

Q. Well, was he going to pay Clarence anything for a share in the estate?

A. Well, I don't know. He would give him some; I don't guess he was getting very much.

Q. What is your birth date, Mr. Maneke?

A. You mean when I was born?

Q. Yes.

A. Twenty-sixth day of February.

Q. What year? A. 1891.

Q. Are you employed anywhere?

A. I did work at the stave mill.

Q. Are you employed anywhere?

(Testimony of Henry Maneke.)

A. No.

Q. When did you last work at the stave mill?

A. Oh, it was in nineteen—well, I worked a little bit this spring but not but just a few days, I didn't practically work any much unless it was 1946.

Q. What time in 1946 did you quit work there?

A. Oh, along about the end of the year.

Q. How steadily had you been working there up to that time?

A. I didn't work steady there, just now and then.

Q. Well, how often?

A. Oh, maybe two or three days a week, and then lay out a week or two. I didn't work steady.

Q. Over what period did you work that way?

A. All summer when I wasn't at home working and wasn't able to work.

Q. What did you make at that work?

A. Oh, about 60 cents an hour.

Q. How much did you make altogether from June, 1946?

A. I didn't figure that all up; I wouldn't know. I just worked there as an extra hand. You can ask the boss there at the stave mill.

Q. Well, in your claim there is a statement that you worked part time in the stave mill and earned \$800.00.

A. Well, I expect maybe I did work that much, about \$800.00 in a year.

Q. Well, from what source did you get this information that you made \$800.00? [21]

(Testimony of Henry Maneke.)

A. Well, I got it down on my book down here. I have got the checks, I put it down as I worked.

Q. Well, you have a record of it, then?

A. I have a record up at the house, yes. I can get it there at the house.

Q. Well, why haven't you worked any at the stave mill since December of 1946?

A. Well, they shut down and quit the stave mill. I wasn't able to work steady, and just got a light job there like stacking staves.

Q. Take your hand away, I can't hear you?

A. I got the light job there stacking staves, I didn't do no heavy work at the stave mill, I stacked staves mostly, or else I graded staves.

Deputy Commissioner Brown: Have you any questions you want to ask, Mr. Mayfield?

Mr. Mayfield: No.

Deputy Commissioner Brown: I think that will be all, then.

Witness excused.

CLARENCE MANEKE,

called as a witness, being first duly sworn by the Deputy Commissioner, testified as follows, to-wit:

Direct Examination

By Deputy Commissioner Brown:

Q. What is your name, please?

A. Clarence Maneke. [22]

Q. Your address?

A. 201 South Olive St., Rolla, Mo.

Q. You are attending the Missouri School of Mines there? A. That's right.

(Testimony of Clarence Maneke.)

Q. You are a brother to Adrian Maneke?

A. Yes, sir.

Q. How old are you? A. Twenty-nine.

Q. How long have you been married?

A. 1944, I was married in December, the 20th day of December.

Q. Do you have any children?

A. No, sir.

Q. What do you know about your brother Adrian furnishing your parents with moneys for any purpose?

A. Well, he went to work in Kansas City up till—well, he was in the army, he has had a family allowance or allotment from the government, which is stated, I don't know how much it was for his particular case at the time, but that is stated on his discharge, he had a dependency allotment too, and after he got out of the service, he was discharged January 4, 1945, I believe—1946, rather. I was December 3rd, he was a month after I was. Then he stayed around home, I guess, until in a couple of three months, I don't know for sure, and then he went to Kansas City and went to work for the Ford Motor Company, and he drew,—I don't know his wages, but anyway I do know that his checks ran approximately \$50.00 a week.

Q. Net, you mean?

A. Net. I think you can check with the Social Security Board and get the correct amount if necessary. [23]

(Testimony of Clarence Maneke.)

Q. Income tax contributions.

A. Income tax contributions. I wouldn't say for sure, but I know from experience that he wouldn't hardly work for a job unless he shot \$45.00 or \$50.00 clear on his checks. When he came home he usually made it in on Friday nights, unless holidays, he stayed longer, he gave the folks ranging, I would say it would average \$50.00 a month what time he was working up at Kansas City.

Q. Were you living at home at that time?

A. No, I was in Mexico, Missouri, which he would lots of times come by there and pick me up and bring he on down home.

Q. Well, did you actually see him give this money to your parents? A. Yes, sir, I did.

Q. To whom; to which one did he give the money?

A. He give it to mother mostly, practically all the time he give it to mother because he thought quite a bit of her, naturally.

Q. How often did you personally see him give them money?

A. Well, mostly generally every time I was home. You see, he was home a lot of times that I wasn't, but every time—my brother and I was—pretty close friendship with him, I mean, and he always told me what all he did, and I saw him every time I was home give her money. Of course, now, he was home,—I never made it home but about once a month.

Q. There was about half of his visits you came with him?

(Testimony of Clarence Maneke.)

A. Came with him; he would come and get me.

Q. Did you drive home?

A. He drove down. Picked me up, I didn't have a car at that [24] time, it was a little bit out of his way to make it every trip, to come down around by Mexico makes it 200 miles farther to drive, so he usually averaged about once a month.

Q. Did he give money to your parents every time that he came home?

A. Every time I came.

Q. Do you know the amounts of it?

A. It averaged ten a week, sometimes he would get a little short and maybe he wouldn't give her exactly \$10.00 this time and the next time it would be an average of \$50.00 a month. I know that is what he planned on giving her.

Q. What was that money given for?

A. For the folks to buy subsistence to live on; food, in other words, grocery bills.

Q. You have heard your father's testimony this afternoon?

A. Yes, sir.

Q. With reference to these contributions that were made for the improvement of the home out there. Were those contributions in addition to the \$50.00 a month that you have spoken of?

A. Yes, sir.

Q. Did you see him give any of that money?

A. I didn't see him give that money because he told me he was going to give them that money.

Q. Was it given in one lump sum?

A. Yes, sir, it was given,—he had a bank ac-

(Testimony of Clarence Maneke.)

count here in town and he always give them that money. [25]

Q. That is, your brother had a bank account?

A. My brother had a bank account in town.

Q. Did he draw the money out and give them the cash?

A. I heard him say he was going to give them the cash because at the end of the month he said he would generally save it up. I don't think what time he was up there, he could have easily give them cash because he told me he was intending to give them cash. I don't know, I couldn't swear exactly how he give it to them because I never saw him give it to them, but I do know that he was going to give to them and the bills got paid, so I guess he did.

Q. Did he state the amount he was giving to them?

A. No, he didn't. Said just what it took to fix it. The only thing I do know, that he bought it—my father was a little nervous and got mixed up on that sweeper business,—that was up last winter a little over a year ago we bought that at Montgomery Ward in Kansas City. I think, if he hasn't lost it, I knew there was a check given for it and that check might be in the bank. That check was \$50.00. That was given by check.

Q. That is, the check was made out to Montgomery & Ward?

A. To Montgomery & Ward. I saw that written.

Q. You spoke about his place of residence when

(Testimony of Clarence Maneke.)

he was in California. What have you got to say about that?

A. Now, when he was in California, the only good jobs he had that paid any money, what he didn't live off of, was this at Alameda, [26] and I don't know approximately how long he worked at that. Of course, that can be checked up from the company, they know that record.

Q. Well, they have reported it was about a month?

A. Well, I judge that was about right, because, now, he worked—well, he went out to California more or less, I think, to see the country or something, more of a vacation, he wasn't intending to stay long because I got a letter to that effect that he was intending to come back this fall and go to school, he didn't say definite, but he said he was planning on that, and he said that he had this good job.

Q. Well, you are still going a long way around to give me his address?

A. Well, his address. Well, he worked at Los Angeles for a while, but that address I don't know, then came up to Modesto, that is about a hundred miles——

Q. I know where Modesto is; go ahead.

A. And then his address was in Oakland, California, it was on 83rd Street, the exact number I don't know.

Q. Well, the employer gives it as 2040 83rd Avenue?

(Testimony of Clarence Maneke.)

A. That is correct, it was on 83rd Avenue.

Q. Well, this \$50.00 that you have heard your father testify to that he sent some time in February was probably sent from where?

A. That I couldn't tell. I imagine from down around Los Angeles some place because that was before they went up there. He [27] went to Oakland from down—I mean the latter part, I don't know what month he went up there.

Deputy Commissioner Brown: Any other questions, Mr. Mayfield?

Mr. Mayfield: No.

Deputy Commissioner Brown: Mr. Dillard?

Mr. Dillard: What is your procedure with reference to objections, Mr. Brown?

Deputy Commissioner Brown: Well, I listen to them and if I think they are good I will approve them and if not I will overrule them.

Mr. Dillard: I would like to enter a general objection to all of the statements that Clarence Maneke made with reference to conversations that he had with his brother as to the amount of money that he paid to his parents because that doesn't give us an opportunity to examine the deceased; we have no way of disproving or proving it. And, furthermore, conversations that Clarence had with his parents as to how much the deceased gave him, I think that his testimony should be limited to what he knows of his own knowledge that Adrian Maneke gave to Mr. and Mrs. Maneke.

Deputy Commissioner Brown: Well, there is a provision in the Longshoremen's Compensation Act

(Testimony of Clarence Maneke.)

that hearsay evidence may be received, but it cannot be used as a [28] basis for an award unless it is corroborated.

Mr. Dillard: Yes, sir. I was entering that objection just for record purposes.

Deputy Commissioner Brown: Well, I will convey your objection to the Deputy Commissioner in San Francisco, who will make the decision on the case, and he can weigh and segregate the evidence himself.

Examination by Mr. Dillard:

Q. Clarence, do you know of your own knowledge how much money Adrian sent his mother and father from California?

A. No, sir, I don't. I never saw that. He never exactly said, only that he was sending money, but what he sent I don't know.

Q. You heard your father testify that he had sent them one sum of \$50.00?

A. Yes, sir.

Q. And I believe your father testified that that was received in February?

A. Yes, sir.

Q. And you don't know of your own knowledge of any other moneys that was sent from California?

A. No, the only thing that he told me——

Q. No. Conversations, I am not interested in that. Just of your own knowledge, if you happened to be at home when you saw a letter come in and read the letter and money fell out of it or something like that?

A. No.

Q. You don't know?

A. No. I have a letter in my own possession stating that the folks, if they are in need of any-

(Testimony of Clarence Maneke.)

thing, [29] to let me know and I will come home immediately if they need me personally or if they need anything,—I took it to mean money at the time,—why write me and let me know.

Q. I believe you told the Commissioner that when Adrian went to California he went there primarily on a vacation, is that right?

A. Well, I just judged that myself, for his intention was staying out there temporarily. If he was going out there for a permanent job, why he would have took a lot—he left all of his winter clothes at home, he never took them.

Q. What was the impression that you had from your brother when he left Missouri to go to California with reference to getting work out there; did you think he was going to get a job and stay out there?

A. Just get a job to carry him along out there, and also he said, take his expenses, of course he was taking care of the folks all the time, that's all he had to take care of them, it wouldn't take too much money for him, that and his car, that is about all he had to keep up.

Q. That is all, I think, sir.

Witness Excused.

Mr. Dillard: Mr. Brown, I would like to ask Mr. Maneke one more question that I overlooked. The elder Mr. Maneke.

HENRY MANEKE,

claimant herein, recalled as a witness, having heretofore been first duly sworn, testified further as follows, to-wit: [30]

Examination by Mr. Dillard:

Q. You stated this morning, Mr. Maneke, before the Commissioner, Mr. Brown, and myself when we dismissed the bank records that the bank records did not reflect any payment that you received from your son?

A. Why, no, I don't think so, no.

Q. Well, I mean, that was your statement. Isn't that correct?

A. I think it was, yes. I think I told you that the money he sent me, I didn't have no checks where he sent me through the bank, no.

Q. That is what I say, that bank account as reflected from the ledger did not show any money that your son had sent you?

A. No, that's right. Only the State Bank, now, they have got an \$11.00 check over at the State Bank that he sent. It is there at the State Bank. Did you get it, Clarence? I think there was an \$11.00 check over there yet where he sent me \$11.00. That was along about January, some time in January.

Q. I believe you told the Commissioner and me this morning, however, that you did bank at the First National Bank, is that right?

A. That is where I drew my—

(Testimony of Henry Maneke.)

Q. And that Adrian had his account at the State Bank? A. At the State Bank.

Q. I see. That is all.

Q. (Deputy Commissioner Brown): Well, do you mean there is a cancelled check that is still over there? [31]

A. There is an \$11.00 cancelled check there at the Lebanon State Bank if the Administrator hasn't drawn it out.

Witness Excused.

CLARENCE MANEKE,

recalled as a witness, having heretofore been first duly sworn, testified further as follows, to-wit:

Examination by Mr. Dillard:

Q. Clarence, I believe you are the administrator of the estate of Adrian? A. That's right.

Q. Do you recall how many months Adrian worked prior to his death since his discharge from the army and within one year prior to his death?

A. Well, I couldn't tell you the months. I can tell you when he went to work. He went to work about—he got his discharge in January and he went to work, the first job he had was in March.

Q. March of what year?

A. Of 1946. He had—well, he worked at the railroad in Springfield for a little while, but he didn't like that and quit there.

Q. Well, I don't want to carry you through those jobs. Now, from March, 1946, until the time

(Testimony of Clarence Maneke.)

he left Missouri,—what month did he leave Missouri?
A. He left in January.

Q. In January of 1947?

A. This year; 1947.

Q. I believe the record shows that he went to work for General Engineering & Dry Dock Corporation when?

Deputy Commissioner Brown: It doesn't say when, but the period of employment on the report of the insured is given as one [32] month.

Q. (Mr. Dillard): Do you know of your own knowledge how long he had been working for the General Engineering & Dry Dock Corporation?

A. Just approximately.

Q. What would you say?

A. I would say it was approximately a month, I don't know, I wouldn't swear to that because I just——

Q. And he was drowned on the 26th day of June and, accepting your figures, he went to work some time, we will say, in May, 1947, is that correct?

A. If he worked a month. Now, you would have to check with the company to find out for sure.

Q. He left Missouri, then, in January of 1947?

A. That's right.

Q. And he went to work in May of 1947 in California?

A. No, that is at that company, but he had other jobs, temporary jobs. He was around Los Angeles a while.

(Testimony of Clarence Maneke.)

Q. All right?

A. But what he made I don't know, I never did find out for sure. He made some pretty good money there.

Q. Now, for the period of his employment prior to his death do you know approximately how much he saved or how much he deposited in his own account at the State Bank?

A. He never deposited any.

Q. Did he have a bank account with the State Bank at the time of his death?

A. He had a bank account with the State [33] Bank here at the time.

Q. How much did he have in it?

A. Well, at the time of his death, now, that is, I couldn't say for sure, but I think it was approximately \$1700.00 in the bank up here.

Q. And did he own any property?

A. Nothing but an automobile.

Q. What kind of an automobile?

A. Mercury.

Q. Of what year?

A. '40 model,—1940 coach.

Q. When did he buy that?

A. He bought that, I don't know for sure, he bought that here in town from Montgomery. I couldn't—I don't know. He bought that in the summer some time.

Q. Summer of 1946?

A. That's right, somewheres along about May or June, I wouldn't say for sure.

(Testimony of Clarence Maneke.)

Q. Do you know how much he gave for it?

A. No, I don't.

Q. Do you know the value of automobiles?

A. I know the ceiling price of them at that time.

Q. What was the price on this Mercury, do you know?

A. I would judge that Mercury around \$850.00 at the time, but what he paid for it I couldn't tell you.

Q. I see. That is a good answer. That's all.

Q. (Deputy Commissioner Brown): Was the Mercury paid for? A. Yes.

Witness Excused. [34]

MOLLIE MANEKE,

claimant herein, called as a witness, being first duly sworn by the Deputy Commissioner, testified as follows, to-wit:

Direct Examination by Deputy Commissioner Brown:

Q. Will you state your name, please?

A. Mollie Maneke.

Q. And your address?

A. Lebanon, Missouri, Route one.

Q. You were the mother of Adrian Maneke?

A. Yes, sir.

Q. You have heard the testimony of your husband here and your son with reference to the contributions that Adrian made toward your support and the repair of your home out there. Can you

(Testimony of Mollie Maneke.)

give us any better idea as to the amounts of money that your son gave?

A. Well, I don't know, he would come home every two weeks and bring his laundry, he would bring it home for me every two weeks. Well, he would give me the check that he would have, he would say "Mama, here is the check."

Q. The what?

A. The check that he would have, that he would draw at Kansas City.

Q. Was that a pay check or a check on some bank up there?

A. No, that was his pay check, and he says "Mama, here's the check," says, "take it and get what you need out of it."

Q. What would those checks amount to?

A. Well, I just forget. You know, I have had so much, seemed [35] like, trouble here lately that I just can't remember anything hardly.

Q. Well, he had endorsed those checks hadn't he?
A. Yes.

Q. And you had to re-endorse them to get money, didn't you?

A. Yes. I would take them up to the bank and cash them and then I would keep out what money I would need.

Q. What did you do with the rest of it?

A. Well, I deposited it in his name over at the State Bank.

Q. Oh, I see. How much money did you keep out of those checks?

(Testimony of Mollie Maneke.)

A. Well, I would keep all the way from \$10.00 a week, every two weeks that he would——

Q. That would be \$20.00, then?

A. Twenty dollars every two weeks out of the checks that he would give me.

Q. Was it a regular deduction that you made?

A. As long as he worked up at Kansas City he would bring them down.

Q. Did he bring all of his checks?

A. Yes.

Q. How often was he paid?

A. Well, he was paid——

Q. Once a week or two weeks?

A. Well, he didn't come home but every two weeks.

Q. Well, how often was he paid?

A. Well, he was paid, I guess, every week.

Q. So it would be only every alternate pay check, then, that [36] he would bring home?

A. Well, every other one he would bring to me, and then he would give me \$20.00 for the two weeks; it would be \$10.00 a week is the way it would be; and I would cash them when he came home and put the rest of it in the bank.

Q. That was during the entire six months that he was up there at Kansas City?

A. Yes, in Kansas City.

Q. Do you know whether this money that was given for the improvement of the place out there or the fixing up of the barn was all given at one time or was it given as it was used?

(Testimony of Mollie Maneke.)

A. Well, he give it, part of it for the barn, mostly at one time, and then——

Q. Was that money in cash or in the form of a check? A. Well, it was cash.

Q. Did he draw it out of the State Bank here or did he have it saved elsewhere?

A. Well, he had it up here at the bank; it was deposited here in the bank, but he would come out with his checks and then he would save it and bring it and give it to us when we needed it.

Q. I don't think we quite understand each other yet. Did he draw this \$275.00 out of the bank to use for this barn improvement?

A. No, he give it as—well, I don't know, he give it as he had it, you know.

Q. He just brought it to the house in cash?

A. Yes, in cash, and give it to us. [37]

Q. Did he give it to you or to his father?

A. Well, he give it to his father.

Q. Do you know the amount of it?

A. Well, not exactly, because he would give it to him for the barn, and then the other checks he would always give them to me.

Q. Did you see the money that he gave to his father?

A. Well, I seen the money but I never counted it. He just says "Adrian, give me so much money to help on the place."

Q. Do you know anything about the amount of money that was spent on the improvement of the house?

(Testimony of Mollie Maneke.)

A. Well, I don't know just exactly how much, but I know what he did.

Q. What was that?

A. We got those cabinets, the cabinets we ordered,—there weren't no cabinets in the house when we got there, and no sink or anything. You see, he helped, and he helped me put them in, he got them for me, and they cost right around—well, let's see,—about a hundred dollars is what it cost, the cabinets and sink and fixing it in there, and he intended to put the water—running water in the house, he was going to put the bath and stool and everything all there at the porch where we built this one room and fixed and he hadn't never saw this one room, we had it all fixed, I wrote to him and told him we hadn't ever got it all fixed. Well, he says "Mama, when I come home I will fix it for you."

Q. This cabinet and sink, you say, cost about \$100.00? [38]

A. Yes, that is about what it cost.

Q. Was there some additional expense for the other items? A. You mean——?

Q. For the stool, wash bowl and so on?

A. Well, we haven't got that in. We didn't even do that since this happened.

Q. Oh, I thought you said that was there but hadn't yet been attached?

A. No, that is not the way I said it. I said he was supposed to put it in for me. You see, he was going to do all of this.

(Testimony of Mollie Maneke.)

Q. But you did build a room on the porch for it?

A. Yes, we weatherboarded it all up and fixed it there. Of course, I have got a bath tub there, but the rest of it isn't there, and he was intending to do it all there for me.

Q. Well, what is your best judgment as to the entire amount that your son gave or sent to you during that 12 months before his death?

A. I just couldn't hardly say. He would just bring it in and says "Mama, here's some money, if you need it just use it" and I would just take it and use it.

Q. Did he give you any authority to draw checks on his bank? A. Yes, he did.

Q. Did you draw any checks?

A. No, we hadn't, because I just thought, well, he was young and what he put in the bank I would just leave it and just let him give us what he wanted to, so we didn't draw none, but he says, [39] "Mama, if you need it." Now, I bought me a refrigerator last fall, we got it last winter, and he wanted to get that for me all last summer and he says "Mama, if you need the money, just write a check on my account." So my son over here got it for me and we didn't write no checks.

Q. What did that cost?

A. Two hundred and thirty some odd dollars, I think that is what it was.

Q. (Mr. Dillard): Now, you mean that Clarence bought it for you?

(Testimony of Mollie Maneke.)

A. Well, he got it, but the way it was, I paid him out of the other money, you see.

Q. Oh, I see.

A. Clarence got it first for me but I paid Clarence afterwards, you see, out of the money that he told me to use of his money.

Q. (Deputy Commissioner Brown): What was the date of your birth?

A. Well, it is—well, I am just three years younger than him and I forget. The 10th of March.

Q. Well, he said he was born in 1891; that would make you '94, then?

A. Yes, that is what it is, would be '94.

Examination by Mr. Dillard:

Q. Mrs. Maneke, did Adrian know that he was to get this farm after you and Mr. Maneke passed on?

A. Yes, we told him if he would take care of us why—

Q. He would get your farm?

A. —he would have it. [40]

Q. Approximately what is your income each week from the sale of cream or—

A. Well, I'll tell you. You know, feed is awful high. When we take anything to sell we have to put it right back in feed, and we don't get any income. When we take our stuff up here in town and buy our groceries we don't have anything left.

Q. But ordinarily you do get feed and groceries out of the—

A. Sure, we buy our feed and groceries and things like that.

(Testimony of Mollie Maneke.)

Q. Other than that there is nothing left?

A. No, there is nothing left.

Mr. Dillard: If the Court please, on the record, I want to object to the statement that Mrs. Maneke made with reference to the intention of the deceased, Adrian, and to all statements that she made with reference to payment of money that she doesn't know of her own knowledge and based upon hearsay from statements of her husband.

Deputy Commissioner Brown: I don't recall any such statements.

Mr. Dillard: Yes, sir, she said that what Mr. Maneke had told her several times, that he had given her money, that he intended to do additional things.

Deputy Commissioner Brown: Oh, well, that is not a contribution.

Mr. Dillard: I believe that is all I have.

Witness Excused. [41]

CLARENCE MANEKE,

recalled as a witness, having heretofore been first duly sworn, testified further as follows, to-wit:

Examination by Deputy Commissioner Brown:

Q. You have heard your father's testimony here with reference to the arrangements that he had with your brother, Adrian, about this farm, and that you had something fixed up between the two of you as to what you were to get, if anything, out of the farm. Could you tell us anything about that?

A. Well, the only thing I could say about that,

(Testimony of Clarence Maneke.)

of course the farm isn't worth a great deal and the folks have got to live quite a while, I hope, and I says "Adrian," I says, "I am married, I have got a family to look after," says, "If you will take care of the folks, why" I says, "as far as I am concerned, anything that is left in the estate, what is in it is yours." He says, "Well, I don't care nothing about that," says "I will contribute the money to the folks and you stay there and take care of them any other way you can help them out while I am out working," he says, "You will probably be around home more often than I am, if there is any sickness. As far as the farm is concerned or anything like that, when that time comes we will take care of that, we will——"

Q. You had no definite arrangements?

A. Well, that is what Daddy said he would do for us and as far as I was concerned, and Adrian, he was a good-hearted kid and he just didn't want to kinda hear of having it that way. When the time comes we will settle that. Now, that is what he told me, he [42] says "We will worry about that when the time comes."

Witness Excused.

Deputy Commissioner Brown: Is that all?

Mr. Dillard: That is all.

Deputy Commissioner Brown: All right, case submitted.

(And this was all of the evidence offered and received on the hearing of the above entitled matter.)

REPORTER'S CERTIFICATE

State of Missouri,
County of Laclede—ss.

I, Arthur L. Funk, do hereby certify that I am now and have been since January, 1935, the duly appointed, qualified and acting Official Court Reporter of the Nineteenth Judicial Circuit of Missouri; that I was in attendance and reported in shorthand the proceedings had on the hearing held in the above entitled matter at Lebanon, Mo., on Tuesday, the 21st day of October, 1947; and that this page and the foregoing forty-two (42) pages contain a full, true and complete transcript of my shorthand notes of said proceedings, as reported by me at that time.

Done at my office in Lebanon, Missouri, this 25th day of October, 1947.

/s/ ARTHUR L. FUNK,
Official Court Reporter, Nineteenth Judicial Circuit, State of Missouri.

[Endorsed]: Filed March 24, 1948. [43]

[Endorsed]: No. 12115. United States Court of Appeals for the Ninth Circuit. Industrial Indemnity Exchange and General Engineering and Drydock Corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency and Henry Maneke and Mollie Maneke, Parents of Adrian Maneke, Deceased, Appellee. Transcript of Record, Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 6, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

At a Stated Term, to-wit: The October Term, 1948, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixth day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Present: Honorable Albert Lee Stephens, Circuit Judge, Presiding, Honorable William Healy, Circuit Judge, Honorable Homer T. Bone, Circuit Judge.

[Title of Cause]

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE TRANSCRIPT AND
DOCKET CAUSE

Upon consideration of the motion of appellants for an extension of time to file the transcript of record and docket above cause in this court, and stipulation of counsel thereto, and oral presentation thereof by Mr. Donald R. Brophy, counsel for appellants, and good cause therefor appearing, it is ordered that said motion be, and hereby is granted, and that the time of appellants to file the transcript of record herein, and docket above cause in this court be, and hereby is extended to and including this date.

In the United States Court of Appeals
for the Ninth Circuit

No. 12115

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRY-
DOCK CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the 13th Compensation District of the
Bureau of Employees' Compensation, Federal
Security Agency, et al.

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL AND DESIGNATION OF PARTS OF
RECORD NECESSARY FOR THE CONSID-
ERATION THEREOF.

Appellants intend to rely on the following points
on appeal:

(1) That the District Court erred in granting
the motion to dismiss the complaint for an injunc-
tion against the enforcement of the Compensation
Order—Award of Death Benefit entered by the ap-
pellee Pillsbury because said Compensation Order-
Award of Death Benefit was not in accordance with
law in that there was no substantial evidence in
the proceedings before appellee Pillsbury to sup-
port the finding that the claimants in said proceed-
ings were dependent upon the deceased employee

to a substantial extent for support at the time of his death.

(2) That the District Court also erred in granting the motion to dismiss because said Compensation Order-Award of Death Benefit was not in accordance with law in that under the Longshoremen's and Harbor Workers' Compensation Act benefits are payable to partial dependents only "during such dependency" and the evidence in the proceedings before appellee Pillsbury established that if any dependency existed at the time of death it had terminated prior to the entry of said Order.

Appellants request that the record as certified to the Clerk of the United States Court of Appeals for the Ninth Circuit, be printed in its entirety.

Dated: December 20, 1948.

/s/ LEONARD, HANNA & BROPHY,
/s/ DONALD R. BROPHY, IVAN A. SCHWAB,
Attorneys for Appellants.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed December 20, 1948. Paul P. O'Brien, Clerk.

No. 12,115

IN THE

United States Court of Appeals
For the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRYDOCK
CORPORATION,

Appellants,

VS.

WARREN H. PILLSBURY, Deputy Com-
missioner for the Thirteenth Com-
pensation District of the Bureau of
Employees' Compensation, Federal
Security Agency, and HENRY MAN-
EKE and MOLLIE MANEKE, Parents of
Adrian Maneke, Deceased,

Appellees.

APPELLANTS' OPENING BRIEF.

FILED

FEB 17 1949

PAUL P. O'BRIEN,

CLERK

LEONARD, HANNA & BROPHY,
DONALD R. BROPHY,
IVAN A. SCHWAB,

465 California Street, San Francisco 4, California,

Attorneys for Appellants.

Subject Index

	Page
Jurisdiction	1
Statement of the case	3
Specifications of error	5
Argument	6
I. The death benefit award was not in accordance with law because there was no substantial evidence that the parents were dependent upon the deceased em- ployee at the time of injury	6
II. Enforcement of the award should be enjoined because benefits are payable only "during such dependency" and the record in this case affirmatively shows that there was no continuing dependency on the part of the claimants	13
Conclusion	15

Engineering and Dry Dock Corporation was insured against liability for compensation benefits payable under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code Secs. 901-950) by Industrial Indemnity Exchange.

An application for benefits under the Longshoremen's and Harbor Workers' Compensation Act was filed within the time allowed by law with Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, by Henry Maneke and Mollie Maneke, father and mother of Adrian Maneke. (Tr. 20, 23) The answer filed by the insurance carrier with the Deputy Commissioner denied that the claimants were dependent upon their deceased son for support at the time of injury but admitted all other material facts. (Tr. 22, 25)

By transfer pursuant to 33 U. S. Code, Sec. 919(g), a hearing was held on October 21, 1947, at Lebanon, Missouri, before Leonard C. Brown, Deputy Commissioner for the Tenth Compensation District. (Tr. 29) Thereafter, on February 19, 1948, Appellee Warren H. Pillsbury, as Deputy Commissioner, filed in his office and served upon the parties a Compensation Order—Award of Death Benefit. (Tr. 26) Within the time allowed by law and pursuant to the provisions of 33 U. S. Code Sec. 921, appellants filed their complaint for injunction against the enforcement of the order in the United States District Court, Northern District of California, Southern Division, con-

tending that the Compensation Order—Award of Death Benefit was not in accordance with law. (Tr. 2)

On July 6, 1948, the Honorable Michael J. Roche, District Judge, made and filed an order dismissing the complaint for injunction. (Tr. 11) Notice of appeal was filed August 5, 1948. (Tr. 12) Cost bond on appeal was filed and approved on August 5, 1948. (Tr. 13)

Jurisdiction of this Court upon appeal is invoked under 28 U. S. Code 1291 (formerly Section 128(a) of the Judicial Code).

STATEMENT OF THE CASE.

Adrian Maneke was discharged from the army on January 4, 1946. (Tr. 51) At that time and at all times up to the date of hearing on October 21, 1947, his parents lived on a farm near Lebanon, Missouri, which was owned by the father and had been purchased by him with moneys obtained from the sale of another farm which he had previously owned. (Tr. 46) The father testified that the farm cost him between \$5000 and \$6000 (Tr. 34), and the verified claim filed by the parents in July, 1947, states that at that time they owned real estate of the assessed value of \$5000, on which there was no indebtedness. (Tr. 21) Adrian Maneke obtained employment in Kansas City, Missouri, in March, 1946, and continued to be employed there until he left for California in January, 1947. (Tr. 60) During this period of employment, it was

the regular practice of Adrian to drive from Kansas City to Lebanon, Missouri, every two weeks to spend the week-end with his parents. (Tr. 64, 65) On these visits he made contributions to his father that were used to make improvements on the farm. These contributions for the period that the decedent worked in Kansas City totaled \$275 for improvements to the barn and \$165 for improvements to the house. (Tr. 39) In addition, Adrian would deliver his pay check to his mother to be cashed for him, with instructions to "take it and get what you need out of it". (Tr. 64) The mother testified that the amount taken out by her averaged \$10 per week during the time that Adrian was employed at Kansas City. (Tr. 65)

Adrian quit his employment in Kansas City and left Missouri for California in January, 1947. (Tr. 61) He lived first in Los Angeles, then at Modesto, and finally at Oakland until he was fatally injured on June 26, 1947. (Tr. 55) He had worked only one month for General Engineering and Dry Dock Corporation at the time he was injured. (Tr. 55) During the six months that Adrian was in California he sent money to his parents on only one occasion. The testimony of the father in that respect is as follows:

"Q. Well, how often after he went to California did he send you money?

A. Well, he just sent once to me after he went to California. You see, he hadn't been out there very long.

Q. He had been there six months, I thought you said?

A. He was.

Q. But he only sent you money once?

A. One time.

Q. And when was that?

A. Well, it was about a month or so after he went out there.

Q. What was the amount of it?

A. Fifty dollars, about \$50.00, something like that.

Q. That would be some time in February?

A. Well, I imagine it was February or March, somewhere along there." (Tr. 38)

At the time of his death, Adrian had a bank account of approximately \$1700 in the Lebanon State Bank. (Tr. 62) The mother had authority to draw checks on this account but had never done so because no need for money from the bank account had ever arisen. (Tr. 68) The father had a bank account at all times since 1944 until the day of the hearing and none of the money in that account had been received from Adrian. (Tr. 43)

SPECIFICATIONS OF ERROR.

I.

That the District Court erred in granting the motion to dismiss the complaint for an injunction against the enforcement of the Compensation Order—Award of Death Benefit entered by the appellee Pillsbury because said Compensation Order—Award of Death Benefit was not in accordance with law in that there

was no substantial evidence in the proceedings before appellee Pillsbury to support the finding that the claimants in said proceedings were dependent upon the deceased employee to a substantial extent for support at the time of his injury.

II.

That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that under the Longshoremen's and Harbor Workers' Compensation Act benefits are payable to partial dependents only "during such dependency" and the evidence in the proceedings before appellee Pillsbury established that if any dependency existed at the time of injury it had terminated prior to the entry of said Order.

ARGUMENT.

I.

THE DEATH BENEFIT AWARD WAS NOT IN ACCORDANCE WITH LAW BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE THAT THE PARENTS WERE DEPENDENT UPON THE DECEASED EMPLOYEE AT THE TIME OF INJURY.

Subdivision (b) of Section 9 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code 909(b), provides for the payment of a death benefit to the parents of a deceased employee "if dependent upon him at the time of the injury". Subdivision (f) of Section 9 further provides:

“All questions of dependency shall be determined as of the time of the injury.”

The record in this case does not furnish support for the finding of the Deputy Commissioner that the parents were dependent upon the deceased employee as of the time of the injury. The requirements for dependency under the Longshoremen's and Harbor Workers' Compensation Act are well stated in *Weeks v. Behrend*, 135 Fed. (2d) 258. In that case a wife was living apart from her husband by mutual consent. In holding that the evidence would not support a finding of the Deputy Commissioner that the wife was in fact dependent for support on the husband at the time of injury, the Court said: “Appellant's husband made no regular contributions to her support. Though partial dependency will sustain an award of compensation, occasional contributions will not sustain a finding of partial dependency unless they are ‘necessary and relied on’.”

Another case giving a good statement of the general rule is *Hancock v. Industrial Commission*, 58 Utah 192, 198 Pac. 169. In holding that the parents were not dependent upon a deceased employee, the Court stated: “Alleged dependents, such as the plaintiffs, are required to show facts upon which such dependency exists. The statute makes the wife and certain minor children presumptively dependents. But dependency in other cases must be based upon proof of facts creating such dependency. It is settled in this state, and the same is supported by the authorities,

that an occasional gift or contribution made at the convenience or pleasure of the donor does not authorize an inference of dependency.”

Measured by this standard, there was no dependency by the parents of Adrian Maneke as of the time of his injury. During the six months he had been in California, there had been but one contribution of \$50. That sum does not represent a substantial contribution to the support of two people for a six-month period. That there was no need for support as of the time of injury is evidenced by the fact that the mother had authority to draw checks against a bank account containing approximately \$1700 but did not find it necessary to exercise that authority. Indeed, the very language used by the mother in testifying negatives the existence of any need, for she said:

“Q. Did he give you any authority to draw checks on his bank?

A. Yes, he did.

Q. Did you draw any checks?

A. No, we hadn't, because I just thought, well, he was young and what he put in the bank I would just leave it and just let him give us what he wanted to, so we didn't draw none, but he says, [39] ‘Mama, if you need it.’ Now, I bought me a refrigerator last fall, we got it last winter, and he wanted to get that for me all last summer and he says ‘Mama, if you need the money, just write a check on my account.’ So my son over here [referring to Clarence Maneke, another son present at the hearing] got it for me and we didn't write no checks.” (Tr. 68)

Deputy Commissioner Brown in framing his questions at the hearing took the position that contributions made for 12 months prior to the death of the employee should be considered. (See Tr. 39 and 41) But that is not the law. The statute states that dependency must be determined as of the time of injury. During the time that Adrian was working in Kansas City and regularly making contributions to his mother every two weeks, the parents well may have been dependent upon him. But that does not prove dependency at the time of injury. When Adrian left Missouri for California the relationship between him and his parents was altered completely. Not only were contributions no longer being made regularly but Adrian had no steady employment to afford a means for making contributions. He was injured on June 26, 1947, and had made but a single contribution in the month of February, or possibly March. A single contribution made at a date so remote from the date of injury can scarcely be characterized otherwise than as an "occasional contribution".

No case has been found which discusses the interpretation of the phrase "as of the time of the injury" as it is used in Section 9 (f) of the Longshoremen's and Harbor Workers' Compensation Act. However, there are a number of decisions by state Courts interpreting identical provisions in state workmen's compensation acts. An excellent statement of the rule to be applied is found in the Illinois case of *Robert Gair Co. v. Industrial Commission*, 340 Ill. 99, 172 N.E. 46, which involved a factual situation quite sim-

ilar to the facts in this case. In that case, the deceased son lived with his mother in Belleville, Illinois, during the year 1922 and the early part of 1923. In July, 1923, the deceased son moved to Quincy, Illinois. During the time he lived with his mother in Belleville, he contributed \$10 a week to her support. In holding that the mother was not dependent as of the time of injury, the Court stated:

“After his return to Quincy in July, 1923, the evidence shows that he once sent \$10 to his mother. There is no evidence that from the time he left Belleville until his death, in September, 1923, he sent any further sum. Defendant in error [the mother] testified that he was saving money for her, awaiting the time when she would live with him again.

Plaintiff in error argues that the evidence not only does not show dependency on the part of defendant in error but that it shows that she was not dependent and that deceased was not contributing to her in any substantial manner. The rule is that dependency must be based on evidence that the parent was dependent on the deceased for support at the time of the death of the deceased, and that he had been contributing to her in a substantial manner. * * * Evidence that during the time the deceased lived with defendant in error he contributed to her support is not sufficient to sustain an award, *for the reason that dependency prior to the time of death is not determinative. Such dependency must be shown to exist at the time of the decease of the employee. Where dependency existed but terminated before the accident, it, as a matter of law, does not exist.*

Wedron Silica Co. v. Industrial Comm., supra. The fact that defendant in error expected to be dependent upon deceased in the future or expected to live with him in the future, and that he was saving money for the time when she should live with him, is not sufficient to support an award, as the dependency must be at the time of the death and not a contemplated future dependency.” (Emphasis supplied)

Another case that is in point is that of *MacDonald v. Employers Liability Assurance Corp.*, 120 Me. 52, 112 Atl. 719. As mentioned above, Deputy Commissioner Brown framed his questions at the hearing held in Lebanon, Missouri, on the assumption that it is material to consider all contributions made by the deceased employee for a year prior to his injury. In the *MacDonald* case, the Industrial Accident Commission of Maine had made a similar ruling. In holding that this ruling was erroneous, the Maine Supreme Court stated:

“In determining ‘dependency’, accordingly, it becomes immaterial how much or how little the deceased may have contributed to the claimant in the past. It matters not how dependent the claimant may have been in the past; for the statute upon which his entire right wholly depends requires him to sustain the burden of proof that he was dependent for support ‘at the time of injury’.

The statute which defines ‘dependency’ repeats in every specification, whether in the case of a wife, husband, or child, that it shall be determined in accordance with the fact as the fact may have been ‘at the time of the injury’, and hence admits

no interpretation of its clear declaration that 'dependency' is based upon the status of the claimant at the time of the decease of the person upon whose death his claim is based.'" (Emphasis supplied)

Another quite recent decision with facts similar to the present case is the Delaware case of *Children's Bureau of Delaware v. Nissen*, 3 Ter. 209, 29 Atl. (2d) 603. In that case the father of the deceased employee was a farmer in Oregon. His daughter graduated from the University of Oregon in 1932 and worked as a social worker in the states of Oregon, Idaho, and Washington until the fall of 1938. During all this time, she made contributions for the support of her mother. In the fall of 1938, she went east to do graduate work at the Pennsylvania School of Social Work. She earned nothing until she began work with the Children's Bureau on June 1, 1939. She was killed on June 22, 1939. In denying the claim of the mother, the Court stated:

"The statute limits the issue to the time of the death of the employee. It speaks of the reasonable present. The question is not one of a past dependency, nor of a possible future dependency. The evidence indisputably was that for some nine months prior to June 22, 1939, the deceased had contributed nothing to the claimant's support. * * * What future contributions she might make for the claimant's support, were possibilities dependent on earnings, inclination, health, marriage, and the mother's own financial position. This is a forbidden field of conjecture."

The compensation order in this case is equally subject to the criticism that it is based upon conjecture. Adrian Maneke had not had steady employment during the time he was in California, having shifted from Los Angeles to Modesto, and then to Oakland. He had worked for a month for General Engineering and Dry Dock Corporation but had made no contributions to his parents out of his earnings on that job. The award is apparently premised upon an assumption that regular contributions to the parents would be resumed, but any such assumption must necessarily be based upon speculation as to whether the position was to be a permanent one, as to whether Adrian's living expenses could be kept at a level where he would be in a position to make contributions to his parents, and as to whether other considerations might make future contributions a possibility. And it has been held that a compensation award under the Longshoremen's and Harbor Workers' Compensation Act based on conjecture is not in accordance with law. (*New Amsterdam Casualty Co. v. Hoage*, 46 Fed. (2d) 837)

II.

ENFORCEMENT OF THE AWARD SHOULD BE ENJOINED BECAUSE BENEFITS ARE PAYABLE ONLY "DURING SUCH DEPENDENCY" AND THE RECORD IN THIS CASE AFFIRMATIVELY SHOWS THAT THERE WAS NO CONTINUING DEPENDENCY ON THE PART OF THE CLAIMANTS.

Heretofore we have discussed subsection (f) of Section 9 of the Longshoremen's and Harbor Work-

ers' Compensation Act. A separate provision of subsection (d) of Section 9 provides that benefits shall be payable to partial dependents only "during such dependency". *Standard Dredging Corp. v. Henderson*, 150 Fed. (2d) 78, holds that compliance with subsection (d) is not shown merely by showing dependency as of the time of injury. It must also be shown that there is a continuing dependency on the part of the claimant.

The words "during such dependency" must mean that the compensation payments are required for the support of the dependents. But the record in this case shows no such continuing need on the part of the parents. The hearing was held on October 21, 1947, which was four months after the date of injury, and no contribution or payment of any sort had been received except in the sum of \$50, paid in the preceding February or March. Yet the claimants still owned their farm and had available the income realized from the sale of its produce, and they still had a balance in their own bank account. Ability to support themselves by their own resources for the four months from the date of injury up to the date of hearing and still maintain a bank account is inconsistent with the concept of a continuing dependency entitling them to compensation benefits. As said by the Court in *Standard Dredging Corp. v. Henderson*, 150 Fed. (2d) 78, at 81:

"The death benefits under the Act are not life insurance to be paid to someone in every case, but arise only when the relationship and circumstances exist which are stated in the Act."

CONCLUSION.

It is respectfully contended that the order dismissing the complaint for injunction should be reversed and that the case should be remanded to the District Court for a proper disposition of the issues of law.

Dated, San Francisco, California,
February 14, 1949.

Respectfully submitted,

LEONARD, HANNA & BROPHY,
DONALD R. BROPHY,
IVAN A. SCHWAB.

Attorneys for Appellants.

No. 12,115

IN THE

United States Court of Appeals
For the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRYDOCK
CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Com-
missioner for the Thirteenth Com-
pensation District of the Bureau of
Employees' Compensation, Federal
Security Agency, and HENRY MAN-
EKE and MOLLIE MANEKE, Parents of
Adrian Maneke, Deceased,

Appellees.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

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FILED

MAR 24 1949

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Statement of case	1
Facts	2
Argument	4
The finding of the Deputy Commissioner as to the depend- ency of the parents is supported by evidence.....	4
Conclusion	30

Table of Authorities Cited

Cases	Pages
Anderson v. Hoage, deputy commissioner, 63 App. D.C. 169, 70 F. (2d) 773 (1934).....	6
Arthur Murray Co. v. Cole, 189 S.W. (2d) 614 (Ark. 1945)	15
Ash v. Modern Sand & Gravel Co., 122 S.W. (2d) 45, 234 Mo. App. 1195	23
Associated Employers' Reciprocal Ass'n v. Lawrence, 264 S.W. 1038 (Tex. 1924).....	15
Associated General Contractors of America, Inc., et al. v. Cardillo, deputy commissioner, 70 App. D.C. 303, 106 F. (2d) 327 (1939)	4
Avignone Freres, Inc., et al. v. Cardillo, deputy commissioner, et al., 73 App. D.C. 149, 117 F. (2d) 385 (1940)...	6
Balthazar v. Swift & Co., 120 So. 896, 10 La. App. 25.....	26
Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner, 284 U.S. 408 (1932).....	4
Batelho v. J. H. Tredenwick, 64 R.I. 326, 12 A. (2d) 282 (1940)	14
Blauvelt v. Thurber, 221 App. Div. 826.....	21
Burley Welding Works, Inc. v. Lawson, deputy commissioner, 141 F. (2d) 964 (C.C.A. 5, 1944).....	6
Bylow v. St. Regis Paper Co., 166 N.Y. Supp. 874 (N.Y. 1917)	15
Cardillo, deputy commissioner v. Liberty Mutual Insurance Company, 330 U.S. 469	5, 31
Clingan v. Carthage Ice & Cold Storage Co., 25 S.W. (2d) 1084 (Mo. 1930)	15
Contractors, PNAB v. Pillsbury, deputy commissioner, 150 F. (2d) 310 (C.C.A. 9, 1945).....	5, 6
Crane Co. v. Industrial Comm., 378 Ill. 190, 37 N.E. (2d) 819 (1941)	14
Crossett Lumber Co. v. Johnson, 187 S.W. (2d) 161 (Ark. 1945)	14
Crowell, deputy commissioner v. Benson, 285 U.S. 22 (1932)	5

TABLE OF AUTHORITIES CITED

iii

	Pages
DeWald v. Baltimore & O. R. Co., 71 F. (2d) 810 (C.C.A. 4, 1934) ; cert. den. October 8, 1934, 293 U.S. 581.....	4
Del Vecchio v. Bowers, 296 U.S. 280 (1935).....	5, 7
Donnelly v. Kingsley & Co., 221 App. Div. 823.....	21
Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al., 21 F. Supp. 535 (Me. 1937).....	5
Empire Zinc Co. v. Industrial Comm., 77 Pac. (2d) 130, 102 Col. 26	24
Engineering Co. v. Harris, 157 Md. 487.....	20
Fidelity & Casualty Co. of New York v. Burris, 61 App. D.C. 228, 59 F. (2d) 1042, 1932.....	4
Froman v. Banquet Barbecue, 284 Mich. 44, 278 N.W. 758 (1938)	14
Garbutt v. Stoll, 287 Mich. 393, 283 N.W. 624 (1939).....	14
Grain Handling Co., Inc. v. McManigal, deputy commissioner, 23 F. Supp. 748 (N.Y. 1938).....	5
Grant v. Marshall, deputy commissioner, 56 F. (2d) 654 (Wash. 1931)	4
Griffin's Case, 315 Mass. 71, 51 N.E. (2d) 768 (1944).....	6
Guidry v. Swift & Co., 199 S. 619 (La. App. 1941).....	14
Gulf Oil Corporation v. McManigal, 49 F. Supp. 75 (W. Va. 1943)	4
Harris, Leon A., t/a L. A. Harris Company v. Hoage, deputy commissioner, 66 F. (2d) 801 (App. D.C. 1933).....	14
Harris v. Hoage, deputy commissioner, 66 F. (2d) 801 (App. D.C. 1933)	13
Harvey v. Rocklin Mfg. Co., 24 N.W. (2d) 402 (Iowa 1946)	15
Hebert v. Prest Air Devices, 224 App. Div. 799.....	21
Henderson, deputy commissioner v. Pate Stevedoring Co., Inc., 134 F. (2d) 440 (C.C.A. 5, 1943).....	7
Illinois Steel Co. v. Industrial Comm., 139 N.E. 921, 308 Ill. 466 (1923)	24
In re Peters, 116 N.E. 848 (Ind. 1917).....	15
Janecek v. Bonded Floors Co., 223 App. Div. 805.....	21
Jansen v. Harlem Valley Electric Corp., 222 App. Div. 786..	21

	Pages
Jules C. L'Hote v. Crowell, deputy commissioner, 286 U.S. 528 (1932)	13
Kostemo v. H. G. Christman Co., 214 Mich. 652, 183 N.W. 902	15
LaSalle County Carbon Coal Co. v. Industrial Comm., 356 Ill. 421, 190 N.E. 687 (1934)	24
Liberty Mutual Insurance Co. v. Gray, deputy commissioner, 137 F. (2d) 926 (C.C.A. 9, 1943)	5, 7
Linderman v. Beaver Products Co., 222 App. Div. 844	22
Littell v. Lagomarsino Grape Company, 17 N.W. (2d) 120 (Iowa 1945)	15
Lockheed Aircraft v. Industrial Accident Commission, 28 Cal. (2d) 756, 172 P. (2d) 1 (1946)	6
London Guarantee and Accident Company, Ltd. v. Robert J. Hoage, deputy commissioner, 75 F. (2d) 413 (C.A. D.C. 1934)	14, 15
Lowe, Deputy v. Central R. Co. of New Jersey, 113 F. (2d) 413 (C.C.A. 3, 1940)	5, 7
Luckenbach Steamship Co. Inc. v. Norton, deputy commissioner, 96 F. (2d) 764 (C.C.A. 3, 1938)	6
Lytle, C. F. Co. v. Whipple, deputy commissioner, 156 F. (2d) 155 (C.C.A. 9, 1946)	6
Marshall, deputy commissioner v. Pletz, 317 U.S. 383 (1943)	5
Maryland Casualty Co. v. Campbell, 129 S.E. 447, 34 Ga. 311 (1925)	27
Michigan Transit Corp. v. Brown, deputy commissioner, 56 F. (2d) 200 (D.C. Mich. 1929)	5, 14, 18
Moorer v. Putnam Lumber Co., 152 Fla. 520, 12 S. (2d) 370 (1943)	14
Naida v. Russell Mining Co., 159 Pa. Super. 135, 48 A. (2d) 16 (1946)	6
Nelson v. Marshall, deputy commissioner, 56 F. (2d) 654 (Wash. 1931)	4
Norfolk Shipbuilding & Dry Dock Corp. v. Parker, deputy commissioner, 154 F. (2d) 560 (C.A. 4, 1946)	15, 18
Ogden City v. Industrial Commission of Utah, 193 P. 857 (Utah 1920)	15

	Pages
Ottenstein v. Britton, deputy commissioner, 160 F. (2d) 253 (C.A. D.C. 1947)	13, 15, 30
Parker, deputy commissioner v. Motor Boat Sales, Inc., 314 U.S. 244 (1941)	5, 7
Paul v. State Inc. Accident Com., 272 P. 267 (Ore. 1920)...	15
Pittsburgh Plate Glass Co. v. Morgeson, 177 P. (2d) 115 (Okla. 1947)	6
Pocahontas Fuel Company, Inc. v. Monahan, deputy com- missioner, 41 F. (2d) 48 (C.A. 1, 1930).....	14, 20
Pusher v. American Ry. Exp. Co., 183 N.W. 839 (Miss. 1921)	15
Pusher v. American Ry. Exp. Co., 149 Minn. 308.....	20
Rifenbark v. Mohawk Limestone Products Co., 224 App. Div. 803	22
Saderstrom v. Missouri Pacific R. Co., Mo. App., 141 S.W. (2d) 73, 79	27
Sallee v. Calhoun, 46 N.M. 468, 131 P. (2d) 276 (1943).....	14
Seuddy Coal Company v. York, 26 S.W. (2d) 34 (Ky. 1930)	15
Shaffer v. Williams Bros., 44 S.W. (2d) 185, 226 Mo. 635 (1931)	24
Sidoti v. Dutchess Bleachery, 222 App. Div. 705.....	22
Simmons v. Marshall, deputy commissioner, 94 F. (2d) 850 (C.C.A. 9, 1938)	5
Smith v. Roth Cadillac Co., 145 Pa. Super. 292, 21 A. (2d) 127 (1941)	14
South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner, 309 U.S. 251 (1940).....	5, 6
Square De. Co. v. O'Neal, 66 N.E. (2d) 898 (Ind. App. 1946)	6
State Engineering Co. v. Harris, 146 A. 392 (Md. 1929)....	15
Texas Employers' Insurance Association v. Sheppeard, deputy commissioner, 62 F. (2d) 122 (C.A. 5, 1932)...	13, 14, 17
United Employees Casualty Co. v. Summerous, 151 S.W. (2d) 247 (Tex. 1941)	4
Utah Fuel Co. v. Industrial Comm., 15 Pac. (2d) 297, 80 Utah 301	23

	Pages
Voehl v. Indemnity Insurance Co. of North America, 288 U.S. 162 (1933)	5
Wende v. McManigal, deputy commissioner, 135 F. (2d) 151 (C.A. 2, 1943)	15, 18
Wilkin v. Shein's Express Co., 131 M. J. L. 450, 37 A. (2d) 47 (1944)	14
Williams v. John B. Kelly Co., 193 Atl. 79 (Pa. Sup. 1937) ..	26
Wilson & Co., Inc. v. Locke, deputy commissioner, 50 F. (2d) 81 (C.C.A. 2, 1931)	6

Other Authorities

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A., Sec. 901 et seq.	2, 28
New York State Industrial Commission Special Bulletin No. 161, p. 146	20

No. 12,115

IN THE

**United States Court of Appeals
For the Ninth Circuit**

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRYDOCK
CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Com-
missioner for the Thirteenth Com-
pensation District of the Bureau of
Employees' Compensation, Federal
Security Agency, and HENRY MAN-
EKE and MOLLIE MANEKE, Parents of
Adrian Maneke, Deceased,

Appellees.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

STATEMENT OF CASE.

This is an appeal from a decree of the United States District Court for the Northern District of California, Southern Division, Honorable Michael J. Roche, District Judge, confirming a compensation order of the deputy commissioner filed on February 19, 1948, in

which he awarded compensation to Henry and Mollie Maneke, as dependent father and mother, respectively, of Adrian Maneke, who sustained fatal injuries on June 26, 1947, while he was employed as a painter by the General Engineering and Dry Dock Corporation at Alameda, California. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. sec. 901 *et seq.* The compensation liability of the employer was insured by the Industrial Indemnity Exchange.

The claim for compensation was controverted by the employer and carrier and a hearing was duly held before Deputy Commissioner Brown on October 21, 1947. The testimony taken at said hearing is printed in the Transcript of Record and will be referred to later.

FACTS.

The deputy commissioner in the compensation order complained of, found the facts with reference to the employee's fatal injuries and his parents' dependency to be in part as follows:

“That on the 26th day of June, 1947, Adrian Maneke, son of the claimants above mentioned, was in the employ of the employer above named at Alameda, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Worker's Compensation Act, and that the liability of the employer for compensation under said Act

was insured by Industrial Indemnity Exchange; that on said day the said employee while performing services for the employer as a painter and engaged in ship servicing operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in his immediate death as follows: While on a painting float at the after end of the ship he was thrown by a sudden movement of a wheel into the water and was drowned; that the average weekly wages of the claimant herein at the time of his injury amounted to the sum of \$61.60; that claimants herein, Henry Maneke, born February 26th, 1891, and Mollie Maneke, born March 10th, 1894, are the father and mother of the said employee and were dependent upon him to a substantial extent for support at the time of his death; that they are entitled to a death benefit at the rate of 25 per cent of the statutory average weekly wages of the employee, amounting to \$9.38 a week each beginning with June 26th, 1944 (1947) during their dependency or until the further order of the Deputy Commissioner."

The employer and carrier instituted a proceeding for judicial review of the compensation order pursuant to section 21 (b) of the Longshoremen's Act (33 U.S.C.A. sec. 921 (b)) alleging in substance that said order was not in accordance with law.

The court below by judgment on July 6, 1948, sustained the award of the deputy commissioner and it is from said judgment that this appeal is taken.

ARGUMENT.

THE FINDING OF THE DEPUTY COMMISSIONER AS TO THE DEPENDENCY OF THE PARENTS IS SUPPORTED BY EVIDENCE.

Before referring to the evidence, which in our opinion supports the finding complained of, it may not be inappropriate to invite attention to the following well-established principles of compensation law:

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner*, 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris*, 61 App. D.C. 228, 59 F. (2d) 1042, 1932; *Associated General Contractors of America, Inc. et al. v. Cardillo, deputy commissioner*, 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.*, 71 F. (2d) 810 (C.C.A. 4, 1934); cert. den. October 8, 1934, 293 U.S. 581

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v Marshall, deputy commissioner*, 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerous*, 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner*, 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal*, 49 F. Supp. 75 (W. Va. 1943).

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *South*

Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Benson*, 285 U.S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner*, 286 U.S. 528 (1932); 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Marshall, deputy commissioner v. Pletz*, 317 U.S. 383 (1943); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Liberty Mutual Ins. Co., v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner*, 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al.*, 21 F. Supp. 535 (Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner*, 23 F. Supp. 748 (N. Y. 1938); *Simmons v. Marshall, deputy commissioner*, 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy v. Central R. Co. of New Jersey*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Contractors, PNAB v. Pillsbury, deputy commissioner*, 150 F. (2d) 310 (C.C.A. 9, 1945).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, dep-*

uty commissioner, 63 App. D.C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co. Inc. v. Norton*, deputy commissioner, 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson*, deputy commissioner, 141 F. (2d) 964 (C.C.A. 5, 1944).

It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability: *Wilson & Co., Inc. v. Locke*, deputy commissioner, 50 F. (2d) 81 (C.C.A. 2, 1931); *Naida v. Russell Mining Co.*, 159 Pa. Super. 135, 48 A. (2d) 16 (1946); *Griffin's Case*, 315 Mass. 71, 51 N.E. (2d) 768 (1944); *Pittsburgh Plate Glass Co. v. Morgeson*, 177 P. (2d) 115 (Okla. 1947); *Lockheed Aircraft v. Industrial Accident Commission*, 28 Cal. (2d) 756, 172 P. (2d) 1 (1946); *Square De. Co. v. O'Neal*, 66 N.E. (2d) 898 (Ind. App. 1946).

In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation"; *Avignone Freres, Inc., et al. v. Cardillo*, deputy commissioner, et al., 73 App. D.C. 149, 117 F. (2d) 385 (1940).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *C. F. Lytle Co. v. Whipple*, deputy commissioner, 156 F. (2d) 155 (C.C.A. 9, 1946); *Contractors, PNAB v. Pillsbury*, deputy commissioner, 150 F. (2d) 310 (C. C.A. 9, 1945); *South Chicago Coal & Dock Co., et al.*

v. Bassett, deputy commissioner, 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey*, 113 F. (2d) 413 (C. C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.*, 134 F. (2d) 440 (C.C.A. 5, 1943); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The following is a reference to so much of the testimony taken at the hearing before the deputy commissioner on October 21, 1947, as is considered sufficient to show that the above mentioned finding of fact of the deputy commissioner is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

Henry Maneke testified at the hearing before the deputy commissioner on October 21, 1947, that his address was R.F.D. 1, Lebanon, Missouri; that he is the father of the deceased Adrian Maneke and has lived in Lebanon about three years; that he is about 56 years of age; that he had a nervous breakdown in 1944 and that he had farmed practically all of his life; that the deceased made his home with him but worked at Kansas City and afterwards in California, and that he was drowned on June 26, 1947; that in June 1946, deceased was working in Kansas City (Transcript 31); that he worked for the Ford Motor Company there, and later for General Motors, and

afterward for some other concern which manufactured gears, until about 1947 when he went to California; that during this period from June 1946 to January 1947 he had worked steady and would come home about every two weeks for the week-end (T. 32); that while he was in California he helped them financially in making alterations and repairs to the home; that this was a few weeks before he was drowned; that in July or August in 1946 he contributed towards the repairing and alterations of the barn to the extent of about \$265.00 (T. 33); that he (the witness) owns the place upon which he lives having bought it about three years ago, with money he received from the sale of another farm in Marios County; that he had no other funds (T. 34); that while the deceased worked in Kansas City he would come home about every two weeks and give him money; that before he went to California deceased gave him enough money to last him for a while and to fix the buildings; that deceased gave him \$40 or \$50 when he left in addition to what he spent on the buildings; that the \$40 or \$50 was to take care of small bills for things which they needed around the house, including the installation of a kitchen cabinet which was purchased from Sears-Roebuck Company (T. 35, 36); that after going to California deceased sent him \$50 sometime in February or March (T. 38); *that the contributions in cash since June 1946 amounted to \$275 for alterations on the barn and about \$165 for repairs, etc., to the house, together with the \$50 contribution he sent after going to California* (T. 39);

that this was in addition to the money he contributed when he came home week-ends from Kansas City; that these contributions on his visits home averaged to \$40 or \$50 a month over a period of about six months; that deceased also paid a \$25.00 doctor bill for the witness (T. 40); that at present he has six Jersey cows and a few chickens but there is not much income from his farm; that he sells cream and eggs but by the time he pays for feed and other expenses there is hardly any income left (T. 42); that he expected the deceased to contribute to his support (T. 44); that the deceased told him he could expect a part of his pay check (T. 45); that the purpose of those contributions from the deceased was to improve the farm for his parents to have a place to live and the contributions were also to help his parents when they needed money to live on (T. 46); that his other son Clarence was married and he had to take care of himself; that he (the witness) is not employed and has not worked much since 1946, when he quit sometime around the end of the year, but that even then he only worked now and then, probably two or three days a week, and then laid off a week or two; that altogether since June 1946 he has earned about \$800 in a year (T. 48, 49).

Clarence Maneke testified at the same hearing that he was a brother of Adrian, the deceased, 29 years of age and that he has been married since 1944; that the deceased was discharged from the Army on January 4, 1946; that the deceased had made out a dependency allotment in the Army; that he stayed

around the house for two or three months and then went to Kansas City where he got a job with the Ford Motor Company with a salary of about \$50 a week net (T. 51); that when he came home from Kansas City usually on Friday nights he gave his parents an average of about *\$50 a month*; that he (the witness) was living in Mexico, Missouri, and the deceased would often pick him up and bring him home on his way; that each time he (the witness) was home he saw his brother give his mother money; that he visited home about once a month when the deceased would pick him up and drive him home; that his brother planned to give his mother an average of \$50 a month for the parents' subsistence, for food, groceries and other necessities; that these contributions amounting to about \$50 a month were in addition to those contributions testified to by his father (for the repair of the house and barn) (T. 52, 53); that one matter about which his father was mistaken in his testimony was concerning the electric sweeper; that this electric sweeper was purchased at Montgomery Ward Company last winter, a little more than a year ago for \$50 and was paid for by his brother's check which he saw drawn (T. 54); that he has in his possession a letter written to him from his brother requesting that he advise his brother if his folks were in need of anything and that if necessary he would come home immediately (T. 57, 58); that his brother had a bank account with the State Bank of Lebanon, Missouri, showing a balance of about \$1700 at the time of his death, and he also owned a Mercury au-

tomobile which had a ceiling price at the time of his death of about \$850 (T. 62, 63).

The son Clarence further testified as follows:

“Q. You have heard your father’s testimony here with reference to the arrangements that he had with your brother Adrian about this farm, and that you had something fixed up between the two of you as to what you were to get, if anything, out of the farm. Could you tell us anything about that?

“A. Well, the only thing I could say about that, of course the farm isn’t worth a great deal and the folks have got to live quite a while, I hope, and I says ‘Adrian’, I says, ‘I am married, I have got a family to look after’, says, ‘If you will take care of the folks, why’ I says, ‘as far as I am concerned, anything that is left in the estate, what is in it is yours.’ He says, ‘Well, I don’t care nothing about that’, says ‘I will contribute the money to the folks and you stay there and take care of them any other way you can help them out while I am out working’, he says, ‘You will probably be around home more often than I am, if there is any sickness. As far as the farm is concerned or anything like that, when that time comes we will take care of that, we will—’

“Q. You had no definite arrangements?

“A. Well, that is what Daddy said he would do for us and as far as I was concerned, and Adrian, he was a good-hearted kid and he just didn’t want to kinda hear of having it that way. When the time comes we will settle that. Now, that is what he told me, he says ‘We will worry about that when the time comes’ ”. (T. 70, 71.)

Mollie Maneke testified that she lives in Lebanon, Missouri, R.F.D. 1, and was the mother of the deceased, Adrian Maneke (T. 63); that she was born 1894 (T. 69); that the deceased would return home from Kansas City about every two weeks and *turn over his pay check to her, and would tell her to take it and get what she needed out of it*; that she would take the checks to the bank and cash them and would keep the money she needed; that the remainder of it she deposited in the State Bank in the deceased's name (T. 64); *that she would keep for her need about \$20 or on an average of \$10 per week; that she did this regularly as long as the deceased worked in Kansas City*; that he turned over his check to her every time he came home which was every two weeks; that this continued during the six months he worked in Kansas City (T. 65); that the money which was given by the deceased for improvement on the place and the repair of the barn was given mostly at one time; that this money was given to his father, whereas the other checks were given to her, the witness; that she actually saw it given to the father (T. 66); that deceased also helped to install the cabinets and sink in the kitchen which cost about a hundred dollars (T. 67); that she could not say what the entire amount was that her son gave or sent to her during the 12 months before his death; that he just brought the money in and said: "Mama, here's some money, if you need it just use it", and she would take it and use it; that she also had authority to draw checks on his account; that she bought a refrigerator in the

previous fall, which the deceased had desired her to get all that summer and for which the deceased told her to write a check on his account; that her son Clarence got it for her and paid for it but that she reimbursed him by drawing a check for \$250 on the deceased's account (T. 68, 69); that the income from the farm amounts to practically nothing; that after deducting feed bills and grocery bills there is nothing left (T. 69).

It is respectfully submitted that the testimony referred to above supports the deputy commissioner's finding that the mother and father were dependent upon this deceased employee.

The deputy commissioner's findings of fact in questions of dependency are final and conclusive when supported in evidence: *Jules C. L'Hote v. Crowell*, deputy commissioner, 286 U.S. 528 (1932). (Accord: *Texas Employers' Ins. Assoc. v. Sheppard*, deputy commissioner, 62 F. (2d) 122 (C.A. 5, 1932); *Harris v. Hoage*, deputy commissioner, 66 F. (2d) 801 (App. D.C. 1933); *Ottenstein v. Britton*, deputy commissioner, 160 F. (2d) 253 (C.A. D.C. 1947). In the *L'Hote* case *supra* the Supreme Court in a *per curiam* opinion reversed the United States circuit court of appeals for the fifth circuit in a case where the district court and the circuit court of appeals had failed to give *conclusive effect* to a finding of the deputy commissioner in a case involving a question of dependency, where there was evidence to support the finding.

The decisions under the Longshoremen's Act, to the effect that the question whether the parent of a minor child was dependent upon him is one of fact, are consistent with the decisions under other like compensation laws. This accord may be noted by comparison with the following cases: *Sallee v. Calhoun*, 46 N. M. 468, 131 P. (2d) 276 (1943); *Moorer v. Putnam Lumber Co.*, 152 Fla. 520, 12 S. (2d) 370 (1943); *Wilkin v. Shein's Express Co.*, 131 N.J.L. 450, 37 A. (2d) 47 (1944); *Crossett Lumber Co. v. Johnson*, 187 S.W. (2d) 161 (Ark. 1945); *Froman v. Banquet Barbecue*, 284 Mich. 44, 278 N.W. 758 (1938); *Garbutt v. Stoll*, 287 Mich. 393, 283 N.W. 624 (1939); *Batelho v. J. H. Tredenwick*, 64 R. I. 326, 12 A. (2d) 282 (1940); *Guidry v. Swift & Co.*, 199 S. 619 (La. App. 1941); *Smith v. Roth Cadillac Co.*, 145 Pa. Super. 292, 21 A. (2d) 127 (1941); *Crane Co. v. Industrial Comm.*, 378 Ill. 190, 37 N.E. (2d) 819 (1941).

Under the Longshoremen's Act it is not necessary to establish total or complete dependency, nor does the Act provide that the dependency shall be to a *substantial extent*. A showing of *partial* dependency satisfies the statute. See *Leon A. Harris, t/a L. A. Harris Company v. Hoage, deputy commissioner*, 66 F. (2d) 801 (App. D.C. 1933); *Pocahontas Fuel Company, Inc. v. Monahan, deputy commissioner*, 41 F. (2d) 48 (C.A. 1, 1930); *Michigan Transit Corp. v. Brown, deputy commissioner*, 56 F. (2d) 200 (D.C. Mich. 1929); *Texas Employers' Insurance Association v. Sheppeard, deputy commissioner*, 62 F. (2d) 122 (C.A. 5, 1932); *London Guarantee and Accident Com-*

pany, Ltd. v. Hoage, deputy commissioner, 75 F. (2d) 236 (C.A. D.C. 1934); *Wende v. McManigal, deputy commissioner*, 135 F. (2d) 151 (C.A. 2, 1943); *Norfolk Shipbuilding & Dry Dock Corp. v. Parker, deputy commissioner*, 154 F. (2d) 560 (C.A. 4, 1946); *Ottenstein v. Britton, deputy commissioner*, 160 F. (2d) 253 (C.A. D.C. 1947).

See also the following additional compensation cases wherein an award was affirmed, involving questions of dependency (nearly all as partial dependency cases) arising out of contributions of deceased sons to the support of their parents and other relatives: *Paul v. State Ind. Accident Com.*, 272 P. 267 (Ore. 1920); *Pusher v. American Ry. Exp. Co.*, 183 N.W. 839 (Miss. 1921); *Associated Employers' Reciprocal Ass'n. v. Lawrence*, 264 S.W. 1038 (Tex. 1924); *State Engineering Co. v. Harris*, 146 A. 392 (Md. 1929); *Scuddy Coal Company v. York*, 26 S.W. (2d) 34 (Ky. 1930); *Clingan v. Carthage Ice & Cold Storage Co.*, 25 S.W. (2d) 1084 (Mo. 1930); *Ogden City v. Industrial Commission of Utah*, 193 P. 857 (Utah 1920); *Bylow v. St. Regis Paper Co.*, 166 N. Y. Supp. 874 (N. Y. 1917); *Kostemo v. H. G. Christman Co.*, 214 Mich. 652, 183 N.W. 902; *In re Peters*, 116 N.E. 848 (Ind. 1917); *Littell v. Lagomarsino Grape Company*, 17 N.W. (2d) 120 (Iowa 1945); *Arthur Murray Co. v. Cole*, 189 S.W. (2d) 614 (Ark. 1945); *Harvey v. Rocklin Mfg. Co.*, 24 N.W. (2d) 402 (Iowa 1946).

In *London Guarantee and Accident Company, Ltd. v. Robert J. Hoage, deputy commissioner*, supra, 75

F. (2d) 236, *which arose under the Longshoremen's Act* as applied in the District of Columbia and where it was held that the mother of a deceased employee was dependent upon him, *notwithstanding that the employee's father at the time of the son's death was regularly employed and was receiving wages in the amount of \$77 a week.* The court in this case said:

"The family kept no records of the housekeeping disbursements, but the father and mother estimated the expenses of maintaining the family at approximately \$4,000 a year. All of this, apparently, was paid out of a fund handled by the mother and recruited from time to time by the wages, in whole or in part, of the father and the two sons.

* * * * *

"We do not mean to be understood as intimating that the *mere possession of the bare necessities of life is sufficient to take one out of the role of dependency* where other circumstances bring that condition into operation, nor to confine our definition of dependents to those persons who are not able to support life without assistance, *for if in fact they depend on such assistance as a part of their means of living, and help from others is necessary to sustain them in the position to which they are accustomed to live, they would, as we think, be properly classed as dependents under the statute.*

* * * * *

"The case of the mother presents a somewhat different problem. She had neither property nor income and was wholly dependent on others for her maintenance, and, while it is true her hus-

band owed her the duty of support and had the means to discharge it, the evidence liberally construed in favor of her claim, as we think it should be, may be said to show that she *relied on and received from her son regularly monthly sums of money, which she used and required in part for her support*. That she lived better and more comfortably as the result of the son's contribution does not destroy her claim of partial dependency. It is enough if she depended and relied on what he gave to enable her to enjoy the ordinary and reasonable necessities of life suitable to a person in her position. This, as we think, the evidence shows." (Emphasis supplied.)

In *Texas Employers' Ins. Assn. v. Sheppeard*, deputy commissioner, *supra*, in the fifth circuit, the court stated:

"Within the meaning of the act the father and stepmother of the deceased may have been partially dependent on him, though his contributions were not necessary to enable them to be supported without the help of another or others. The fact that much of the larger part of the money used in the support of the family was supplied by the father was not inconsistent with the father and stepmother being partial dependents of the deceased *if the contributions the latter was in the habit of making were required to enable them to meet the reasonably necessary expenses of living in a way to which they were accustomed, and they looked forward to and relied on the continuance of such contributions for their support*." (Emphasis supplied.)

See also *Michigan Transit Corp. v. Brown*, deputy commissioner, *supra*, wherein the court states:

“Dependency has been generally held not to mean absolute dependency for the necessities of life, but rather that applicant *looked to and relied upon the contributions of the injured employee in whole or in part* as a means of supporting and maintaining himself or herself in accordance with the accustomed mode of life.” (Emphasis supplied.)

In the recent case of *Wende, et al. v. McManigal*, deputy commissioner, *supra*, in the second circuit, the court said:

“Parents are dependent if their own resources are not sufficient to support them, even if they receive help from their other children. To be sure, the parents were not dependent in the sense that they would have been destitute without decedent’s financial assistance. But that is not the test; *the test is whether his contribution was in whole or in part a means of maintaining them in the manner in which they had been living and whether they looked forward to and relied upon the continuance of decedent’s contributions to that end.*” (Emphasis supplied.)

In *Norfolk Shipbuilding & Dry Dock Corp. v. Parker*, deputy commissioner, *supra*, in the fourth circuit, the court said:

“These findings were based on testimony of the mother to the effect that she used the full amount of the money paid to her by her deceased son in the home and in paying bills for food and other household expenses, and that while she kept no

accounts she felt after his death the lack of the money which he had paid to her in his lifetime and realized that she did not have as much to spend for the family as she had had prior to his death. The appellant contends that since the mother did not furnish any figures to show the amount spent by her for food in the household, or to show that the weekly payments of \$15 by the son exceeded the cost of the meals and other expenses entailed by reason of the presence of himself and his wife in the family circle, therefore there was no substantial evidence to support the finding of dependency. We do not think that this argument is tenable. There was enough in the record to support the conclusion of the Deputy Commissioner that the expense of housing and feeding the family of five, including the son and his wife, was more easily borne with the weekly payment of \$15 included in the family budget than it was after the payment ceased and the son and his wife no longer were members of the family. That indeed was the substance of the mother's testimony; and it does not appear that the general household expenses, other than food, were substantially greater because of the presence of the son and his wife in the family group.

“The appellant suggests that after the son's death the mother could have more than made up the loss of income derived from him by furnishing room and board to an outside couple at more than \$15 per week. We do not understand that dependency, as a term as used in the statute, is to be determined on such a basis. The statute expressly provides, 33 U.S.C.A. App. sec. 909 (f), that all questions of dependency shall be deter-

mined as of the time of the injury; and it is generally held under compensation acts that the right of a parent to death benefits does not turn upon the ability of the parent to support life after the death of the child, but *recovery is allowed where the parent depended, at least in part, for the maintenance of his accustomed standard of living upon the contributions of the deceased.* *London Guarantee & Accident Co. v. Hoage*, App. D.C. 75 F. (2d) 236; *Engineering Co. v. Harris*, 157 Md. 487; *Pusher v. American Ry. Exp. Co.*, 149 Minn. 308.

“In the instant case the evidence indicates partial dependency upon the assistance of the son, and partial dependency is sufficient to support an award of the percentage of the wages of the deceased specified in the statute: *Harris v. Hoage*, App. D.C. 66 F. (2d) 801; *Texas Employers’ Ins. Assn. v. Sheppeard*, 5 Cir. 62 F. (2d) 122; *Pocahontas Fuel Co., Inc. v. Monahan*, 1 Cir. 41 F. (2d) 48.” (Emphasis supplied.)

In *Pocahontas Fuel Co. v. Monahan*, deputy commissioner, *supra*, in the first circuit, the court said:

“We do not regard the fact that the father was possibly earning sufficient money to support himself alone as the test of his dependency.”

Following are cases in which awards were made under the New York compensation law from which the Longshoremen’s Act was largely adopted, for fatal injuries to sons who had lived in their parents’ homes, as reported in the New York State Industrial Commission Special Bulletin No. 161, on page 146:

“A rigger hurt by a fall; award to mother; lived with her and her husband whom she had married within the year; had supported her before the marriage; after it, gave her \$9 a week regularly and other money, presents and supplies now and then; *Blauvelt v. Thurber*, 221 App. Div. 826.”

“A steamfitter’s helper killed by a fall; award to mother; lived with her and her husband, his stepfather, who was sickly; gave her \$25 or \$30 a week; she herself earned living premises and \$10 a month as a caretaker; *Donnelly v. Kingsley & Co.*, 221 App. Div. 823.”

“A nineteen year old solderer fatally injured while using an air jack; award of accrued disability compensation and death benefits to his mother; lived with parents and four other children; paid \$7 of his \$18 weekly earnings into the family pot; his father earned \$37 a week: *Hebert v. Prest Air Devices*, 224 App. Div. 799.”

“A carpenter killed by an elevator; award to his seventy-two year old grandmother; mother insane; grandmother had taken her place and reared him with his four brothers and sisters; he had contributed \$15 a week to the family pot: *Janecek v. Bonded Floors Co.*, 223 App. Div. 805.”

“A twenty-two year old lineman electrocuted by a live wire; award to father and mother; lived with them on fifty-three acre farm; father’s age was sixty-four; son gave mother \$5 a week, also gave father money to buy feed and pay taxes: *Jansen v. Harlem Valley Electric Corp.*, 222 App. Div. 786.”

“A pumpman killed by falling roof rock; award to mother; lived with parents, two brothers and

a sister; father had been unwell; earned more than father; gave mother \$15 a week and bought things for the home: *Linderman v. Beaver Products Co.*, 222 App. Div. 844."

"An eighteen year old laborer killed by a fall; award to father; lived on ten acre farm with father; mother and sixteen year old sister; mother and sister did not file claims; son had promised to help pay for and stock the farm; had worked for his employer but ten days; *Rifenbark v. Mohawk Limestone Products Co.*, 224 App. Div. 803."

"Boilermaker's helper, twenty-one years old, killed by collapse of a scaffold; award to mother; lived with father, mother, three brothers and a sister; home mortgaged; father earned \$24 a week; deceased \$23, of which \$13 went to the family: *Sidoti v. Dutchess Bleachery*, 222 App. Div. 705."

In Paragraph X of the complaint it is alleged in substance that inasmuch as the deceased did not contribute to his parents' support during the five months prior to his death they were not dependent upon the deceased for support. The father testified that he received \$50 from the son sometime in either February or March, which could conceivably have been within three months of the death (T. 38).

But assuming *arguendo* that the deceased had not contributed during the five months' period as alleged in the complaint, this would not mean that his parents were not dependent upon him at the time of his death; he intended to help them whenever it became

necessary while he was away in California as evidenced by the letter he wrote his brother wherein he asked his brother to watch out for their parents and let him know what, if anything, they needed, and if it became necessary he would come home. This indicated an intention to continue to attend their needs when the occasion might arise and that he was cognizant of their dependency upon him. The temporary suspension or reduction in whole or in part of the contribution from the deceased to his parents during the period in which he went to California in search of work did not change the status from dependency to non-dependency. The *dependency continued* even though the parents' immediate needs had been temporarily taken care of by the advanced contributions made by the deceased before leaving for California and by the authority given to the mother to check against the deceased's bank account. The courts have uniformly held that the dependency once shown to exist is presumed to continue even though there has been a temporary cessation of contributions during the period immediately preceding the death. A review of the cases to which we are about to refer will show this to be the prevailing view.

Dependency is a condition wherein the dependent person looks to another source than his own means for his support. *Utah Fuel Co. v. Industrial Comm.*, 15 Pac. (2d) 297, 80 Utah 301; *Ash v. Modern Sand & Gravel Co.*, 122 S.W. (2d) 45, 234 Mo. App. 1195. In order to determine whether that condition or status *existed at the time of injury* and whether claimant

actually did, or might reasonably be expected to, look to deceased for support, it is necessary to consider evidence leading up to and prior to the date of injury. In other words, while the status or condition has to be determined as of the time of injury, the evidence upon which the determination of that status or condition is to be made obviously cannot be confined to the date of injury.

The evidence usually presented to show dependency relates to contributions made by deceased to the claimant. If the evidence shows that deceased for some time prior to the injury contributed to the support of the claimant, who had no other means of support or whose means of support were insufficient, the proof would establish dependency. As indicated above, proof of contributions is evidence usually presented, but the condition of dependency could exist although there is no evidence that at the time of injury the deceased was actually making contributions to the dependent. For example, a parent may be dependent upon a child and the latter, although he recognized the dependency in the past, may have been temporarily unable, by reason of illness, unemployment or other circumstances, to make contributions just prior to the injury. *Empire Zinc Co. v. Industrial Comm.*, 77 Pac. (2d) 130, 102 Col. 26; *LaSalle County Carbon Coal Co. v. Industrial Comm.*, 356 Ill. 421, 190 N. E. 687 (1934); *Shaffer v. Williams Bros.*, 44 S.W. (2d) 185, 226 Mo. 635 (1931); *Illinois Steel Co. v. Industrial Comm.*, 139 N.E. 921, 308 Ill. 466 (1923). In the *LaSalle* case, *supra*, the deceased employee had for sev-

eral years paid \$25.00 per month regularly to his older brother and sister-in-law for the support of his aged father who had been unable to work for six years. For two months he failed to pay the \$25.00 per month for his father's keep when it became due, but shortly before he was killed he told his father that when he got his first pay he would pay all arrears due. The court said:

“The record discloses ample competent evidence to establish the dependency of plaintiff upon his deceased son when the latter met his accidental death. The evidence shows conclusively that the two months' break in monthly payments for plaintiff's board did not disestablish the relation of dependency which all the parties had recognized for years. * * * This testimony, in effect, established that the failure of Louis to pay for his father's support was temporary only, necessitated by his present lack of money. It was proper, though not essential, to show the cause for the lapsed payments by the only persons who knew about it, even though other competent evidence clearly showed a continuing and long established dependency. On questions of dependency, the workmen's compensation act should receive a practical and liberal construction. Dependency, once recognized and firmly established by regular contributions for support over a reasonable course of time, is not abruptly terminated by a temporary failure of the contributor to meet his obligations of support as they become due, in the absence of proof that the relationship has definitely ceased to exist by the action of one or both of the parties.”

In the case of *Williams v. John B. Kelly Co.*, 193 Atl. 79 (Pa. Sup. 1937), a mother sought compensation for the death of her son. It appeared that he had helped to support his mother in the past but that owing to his unemployment, the contributions had temporarily ceased; he secured employment again, but was killed shortly after his first pay from which he had sent her nothing owing to the necessity of buying shoes and clothing; he had, however, expressed an intention of sending her money from his new employment. The court said:

“The fact finding authorities were warranted in finding that claimant was practically dependent upon her deceased son. The fact that no contributions were made from the one pay the son received is fully explained by the boardinghouse keeper—that they were used by him to buy needed shoes and clothing. Such temporary cessation of contributions did not establish that the dependency, which previously existed, had ceased. The testimony would have warranted a finding that the mother was actually in need of support, as she was unemployed and had been subsisting upon the contributions made by the son and the married daughter. Under such proof, where contributions were in fact made by the son, his legal obligation to maintain and support his mother qualified her as a dependent.”

As illustrating the point that contributions are not the *sine qua non* in proof of dependency, in the case of *Balthazar v. Swift & Co.*, 120 So. 896, 10 La. App. 25, a parent in destitute circumstances at the time of

death of her son, was held "actually dependent" upon him, under the workmen's compensation law, in view of the legal duty of a child to maintain his parent in need, as provided by the State law, although the deceased child in this case had never in fact contributed anything to the support of his parent, prior to injury. In another case, under the Federal statute, authorizing recovery for death of an interstate railroad employee, it was stated that "dependency" may be founded upon a merely moral obligation resting upon the deceased to render such aid, since a "dependent" is one who is sustained by another or relies for support upon the aid of another, to whom he looks for reasonable necessities consistent with dependent's position in life. (*Saderstrom v. Missouri Pacific R. Co.*, Mo. App., 141 S.W. (2d) 73, 79.)

In another case, arising in Georgia, where under the law dependency must have actually existed at the time of the accident *and three months prior thereto*, it was recognized that physical contributions of *cash or supplies are only evidential of such dependency*, and the fact that they were temporarily interrupted by unemployment, or some cause independent of the will or desire of the employee, and were not made continuously for the three-month period immediately preceding injury as the statute requires, will not necessarily negative dependency, where other evidence showed such dependency. (*Maryland Casualty Co. v. Campbell*, 129 S.E. 447, 34 Ga. 311 (1925).)

The *need* of the dependent having been established, dependency upon the employee can be shown in other ways, one of which would be by acknowledgment on the part of the employee of his intention, will or desire to aid the dependent, in recognition either of his moral or legal obligation to do so, which may derive support from evidence of his past performance in this respect. The facts in each case are largely controlling, and even though the dependent may have several children, in some cases the dependent may show that a particular child was the one looked to or relied upon for aid, and with respect to whom there may reasonably be expectation of such aid, even though fortuitous circumstances may have temporarily prevented actual contributions.

In confining the parents to proof of contributions made by the deceased within one year before his death, the deputy commissioner restricted them beyond the requirement of the statute. There is no provision in the Act that contributions made more than one year prior to the death may not be offered as proof that dependency existed "at the time of injury." There is such a requirement in the Longshoremen's Act (sec. 2 (14) 33 U.S.C.A. sec. 902 (14)) as to the proof in the case of a child to whom the deceased employee is claimed to have stood in *loco parentis*; said relationship must have existed for at least one year prior to the time of injury. As stated above there is no provision limiting the proof of dependency. However, as a practical matter of administration there must be

some time limit placed upon the proof which is offered to establish dependency; the deputy commissioner's action in the instant case of accepting proof of contributions only if made within the year prior to the injury is within administrative discretion and not unreasonable. At any rate it was a restriction placed upon claimants and not upon the employer and carrier who were not harmed by the ruling. If however appellants contend that the deputy commissioner should have confined the proof of contributions to "the time of the injury", meaning that *dependency at the time of the injury* may not be proven by *contributions made before the injury*, they are urging an unreasonable and impracticable construction, which if applied without qualification (appellants do not qualify) would confine the right to compensation to dependent parents only if the deceased employee made a contribution to them at the time of injury, presumably the day of injury. If, as it appears, such construction is unreasonable then it follows that dependency at the time of injury should be provable by contributions made prior to the injury, the only question then remaining being whether and to what extent a time limit should be placed upon the proof of contributions. The deputy commissioner in the instant case restricted the proof to one year. It is not necessary to the issues in the instant case to decide whether or not such a limitation was proper.

It is respectfully submitted that the evidence clearly shows the partial dependency of the parents at the

time of their son's death of a degree well within the degree of dependency shown in the cited decisions and is sufficient to support the finding of dependency at that time.

Appellants raise one other issue, namely that the dependency if any which existed at the date of injury has terminated since "to the date of the hearing on October 21, 1947, said Henry Maneke and Mollie Maneke have not been dependent for support upon any source outside of their own income".

This allegation has no support in the record; there is no evidence in the record that the parents' financial condition or status has improved since the death of their son or that it has improved to the extent that they have become economically independent. *Ottenstein v. Britton*, deputy commissioner, 160 F. (2d) 253 (C.A. D.C. 1947). If appellants have evidence that the dependency has ceased, they may apply to the deputy commissioner for termination of the award under section 22 of the Act (33 U.S.C.A. sec. 922).

CONCLUSION.

It is respectfully submitted that the finding of the deputy commissioner in the compensation order complained of has "substantial roots in the evidence and is not forbidden by the law"; hence the judgment of the court below sustaining the compensation order was proper and should be affirmed. *Cardillo*, deputy

commissioner v. Liberty Mutual Insurance Company,
330 U.S. 469.

Dated, March 16, 1949.

Respectfully subimitted,

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No. 12,115

IN THE

United States Court of Appeals
For the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRYDOCK
CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Com-
missioner for the Thirteenth Com-
pensation District of the Bureau of
Employees' Compensation, Federal
Security Agency, and HENRY MAN-
EKE and MOLLIE MANEKE, Parents of
Adrian Maneke, Deceased,

Appellees.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

FILED

APR 4 1949

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CLERK

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Subject Index

Appellants' reply brief	Page 1
-------------------------------	-----------

I.

The evidence relied upon by appellee Pillsbury to support his order fails to show dependency as of the time of the injury	2
--	---

II.

The cases cited by appellee arising under state compensation laws are distinguishable from the instant case.....	4
Conclusion	5

Table of Authorities Cited

Cases	Pages
Kobilkin v. Pillsbury, 103 F. 2d 667.....	4
LaSalle County Carbon Coal Company v. Industrial Comm., 356 Ill. 421, 190 N. E. 687	5
Robert Gair Company v. Industrial Comm., 340 Ill. 99, 172 N. E. 46	5
Stansfield v. Lykes Bros. S.S. Co., 124 F. 2d 999	5

Statutes

Longshoremen's and Harbor Workers' Compensation Act:	
Section 3 (33 U. S. Code 903)	3
Section 10 (33 U. S. Code 910)	3

No. 12,115

IN THE

**United States Court of Appeals
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Adrian Maneke, Deceased,

Appellees.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

I.

THE EVIDENCE RELIED UPON BY APPELLEE PILLSBURY TO
SUPPORT HIS ORDER FAILS TO SHOW DEPENDENCY AS
OF THE TIME OF THE INJURY.

After summarizing the evidence which appellee contends supports the finding of facts made by the deputy commissioner, his brief contains the following statement: "It is respectfully submitted that the testimony referred to above supports the deputy commissioner's finding that the mother and father were dependent upon this deceased employee." (Brief for Appellee Deputy Commissioner Pillsbury, page 13.) The evidence summarized in the brief does show dependency, but it establishes dependency as of the time the deceased employee was living and working in Kansas City, Missouri, and not dependency "as of the time of the injury" as required by the statute. The argument advanced by appellee ignores, for the purpose of determining the question of dependency, the significant fact that six months before he sustained his fatal injury the employee quit his job and his place of abode in Kansas City, Missouri, removed to California, and changed completely the relationship existing between himself and his father and mother, although for the purpose of determining all other facts which are required by the statute to be determined upon conditions as they existed at the time of the injury the deputy commissioner gave recognition to the fact that as of the time of injury the deceased employee was working at Oakland, California, and not at Kansas City, Missouri.

Under Section 3 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 903), compensation is payable "only if the disability or death results from an injury occurring upon the navigable waters of the United States". For the purpose of determining that he had jurisdiction over the claim presented in this case, the deputy commissioner gave recognition to the fact that at the time he sustained his fatal injury Adrian Maneke was working on a vessel afloat on navigable waters at Alameda, California, and not in a factory in the inland city of Kansas City, Missouri. Again, Section 10 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 910) requires that the computation of compensation shall be based upon the wages of the injured employee "at the time of the injury". For the purpose of determining the average wages of the deceased employee in this case, the deputy commissioner took into consideration the wages paid to him by the General Engineering and Drydock Corporation, his employer at Alameda, California, and not the wages which he had previously earned in his employment at Kansas City, Missouri. We submit that there is neither legal nor logical basis for determining all other points strictly in accordance with conditions as they existed at the time of injury, but ignoring conditions as they existed at that time for the purpose of determining the question of dependency.

Appellants do not assert that it is necessary to establish that a contribution was made on the very day of injury in order to show dependency, or that

there are not many cases in which it is entirely proper to consider contributions made before the injury for the purpose of determining the extent of the dependency existing as of the time of the injury. Where contributions have been made by an employee to persons partially dependent upon him for support over a period of time *and there has been no substantial change in the nature of the arrangement between them prior to the date of injury*, it is proper to consider contributions made prior to the time of injury for the purpose of determining the *rate of contribution* at the time of injury. But where there has been a substantial change in the arrangement between the parties, we submit that consideration can be given only to contributions made after the date that change took place. In this case, the change in relationship took place in early January, 1947, when Adrian Maneke left Missouri for California, and evidence of contributions made prior to that date do not support the finding of the deputy commissioner that dependency existed as of the time of the injury.

II.

THE CASES CITED BY APPELLEE ARISING UNDER STATE COMPENSATION LAWS ARE DISTINGUISHABLE FROM THE INSTANT CASE.

Appellee cites, on pages 21-27 of his brief, a number of state decisions in support of his contentions. As has been pointed out by this and other Circuit Courts (*Kobilkin v. Pillsbury*, 103 F. (2d) 667; *Stansfield v.*

Lykes Bros. S.S. Co., 124 F. (2d) 999) decisions of state Courts are often of little value in determining questions arising under the Longshoremen's and Harbor Workers' Compensation Act because they necessarily turn upon the wording of specific statutes which may not be analogous to the provisions of the federal act. To the extent that the authorities cited by appellee are based upon state statutory provisions similar to those found in the federal act, they are distinguishable on the facts. The cases cited are principally cases in which the basic relationship between the deceased employee and the persons claiming dependency upon him remained in *status quo*, but because of illness, slack work, or other cause beyond the control of the employee, there had been a purely temporary suspension of contributions. For example, appellee quotes at length on page 25 of his brief from the Illinois case of *LaSalle County Carbon Coal Company v. Industrial Comm.*, 356 Ill. 421, 190 N.E. 687. As we have pointed out in our opening brief (pages 9-11), on a factual situation similar to the one presented in this case the Illinois Court, in *Robert Gair Company v. Industrial Comm.*, 340 Ill. 99, 172 N.E. 46, the Illinois Court decided the precise point here involved in accordance with the contentions urged by appellants in this case.

CONCLUSION.

It is respectfully submitted that the finding of the deputy commissioner that the claimants were depend-

ent upon the deceased employee as of the time of the injury is not in accordance with law, and that the order of the Court below dismissing the complaint for injunction, should be reversed.

Dated, San Francisco, California,

April 4, 1949.

Respectfully submitted,

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IVAN A. SCHWAB,

Attorneys for Appellants.

No. 12117

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a Corporation,

Appellant,

vs.

HAROLD BERLINER, Former Collector of Internal Revenue for the First Collection District of California,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

JAN 19 1949

No. 12117

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SOUTHERN PACIFIC COMPANY,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	43
Appeal:	
Certificate of Clerk to Transcript of Record on.	87
Designation of Record on (DC).....	85
Notice of	82
Statement of Points on (DC).....	83
Statement of Points and Designation of Record on (USCA)	88
Certificate of Clerk to Transcript of Record on Appeal	87
Complaint for Recovery of Taxes.....	2
Exhibit A—Claim for Refund and Statement in Support Thereof	18
Exhibit B—Letter dated March 9, 1944, Dis- allowing Claim	35
Exhibit C—Page from Balance Sheet for March 31, 1940	40
Exhibit C-1—Page from Balance Sheet for April 30, 1940	41

	PAGE
Complaint for Recovery of Taxes—(Cont'd)	
Exhibit D—Page from Annual Report to In- terstate Commerce Commission for 1940....	42
Decree, Judgment and	81
Designation of Record on Appeal (DC).....	85
Designation of Record, Statement of Points and (USCA)	88
Findings of Fact and Conclusions of Law.....	78
Judgment and Decree	81
Names and Addresses of Attorneys.....	1
Notice of Appeal	82
Opinion	72
Order of Substitution	48
Petition for Substitution of Plaintiff.....	46
Statement of Points on Appeal (DC).....	83
Statement of Points and Designation of Record on Appeal (USCA)	88
Stipulation of Facts	49

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In the District Court of the United States for the
Northern District of California, Southern
Division.

Civil Action No. 25664-R

SOUTHERN PACIFIC COMPANY,
a Corporation,

Plaintiff,

vs.

HAROLD A. BERLINER, Former Collector of
Internal Revenue for the First Collection Dis-
trict of California,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES

The plaintiff herein, for cause of action against
the defendant, alleges:

1. That plaintiff is now and has been at all times
herein mentioned a corporation duly organized and
existing under and by virtue of the laws of the
State of Kentucky with its principle office in San
Francisco, California, within the First Internal
Revenue Collection District of the State of Cali-
fornia.

2. Defendant at all times between January 1,
1943 and March 31, 1945, was the duly appointed,
qualified and acting United States Collector of
Internal Revenue for the First Internal Revenue
District of California, but is not now in office as
such collector. Said defendant is a resident of San
Francisco, California and of [1*] the southern
division of the northern United States District
Court district of said state, and the venue of this

*Page numbering appearing at foot of page of original certified
Transcript of Record.

suit is laid in said division and district of defendant's residence pursuant to 28 U.S.C. 112 and 114.

3. This is a suit to recover stamp taxes unlawfully collected by defendant from plaintiff under Sections 1800 and 1802(a) of the Internal Revenue Code (26 U.S.C. 1800, 1802(a)). Said suit therefore arises under the laws of the United States providing for internal revenue, jurisdiction over which is conferred upon this court by 28 U.S.C. 41(5). Said suit is also one of a civil nature, at common law, arising under the Constitution or laws of the United States in which the matter in controversy, exclusive of interest and costs, exceeds \$3000, and in which plaintiff and defendant are residents of different states, jurisdiction over which is placed in this court by 28 U.S.C. 41(1) (a) and (b).

4. Section 1800 of the Internal Revenue Code (26 U.S.C. 1800) provides for the imposition of a stamp tax in accordance with the provisions of Section 1802(a) of the Code (26 U.S.C. 1802(a)) (derived from Section 800 of the Revenue Act of 1926, 44 Stat. 99, 101, as amended), which, at the time of the transaction herein referred to, provided as follows:

“Original issue. On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment

trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents until July 1, 1941, and 5 cents thereafter: Provided, That where such shares or certificates are issued without par or face value, the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, [2] per share (corporate share, or investment trust or other organization share, as the case may be), unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents until July 1, 1941, and 1 cent thereafter, on each \$20 of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued."

5. To implement said Act the Commissioner of Internal Revenue has issued certain regulations.

Article 29 of Regulations 71 (1932 Edition) provides:

“The following are examples of issues not subject to the tax:

* * * *

- (i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected without the capital of the corporation being increased, either by transfer of surplus to capital account or otherwise.”

Section 113.25 of Regulations 71 (1941 Edition) provides as follows:

“* * * the following are examples of issues not subject to the tax:

* * * *

- (f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise.”

6. Plaintiff, between the date of its incorporation in 1884 and April 23, 1940, issued, and had outstanding on the latter date, 3,772,763.0564 shares of capital stock having a par value of \$100. A substantial part of said stock was issued between July 1, 1898 and April 12, 1902, or subsequent to December 1, 1914, and during such periods federal stamp taxes on the issuance of capital stock, similar to, but earlier than that now imposed by Section 1802(a) of the Internal Revenue Code, were in effect, and on all [3] such parts of its outstanding capital stock, plaintiff duly paid the federal stamp taxes then in effect.

7. On or about April 23, 1940, after appropriate amendment of its articles of incorporation, plaintiff issued in exchange for its then outstanding par value stock, an identical number of shares of no par value stock.

8. On or about July 15, 1942, the Commissioner of Internal Revenue ruled that original issue stamp tax under Section 1802(a) of the Internal Revenue Code became due upon the entire amount of no par stock issued in the above transaction of April 23, 1940.

9. After demand for payment of such tax, plaintiff, under protest, paid such tax on or about February 26, 1943, by purchasing from defendant, as then duly acting Collector of Internal Revenue for the First Collection District of California, revenue stamps in the amount of forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95), and on the same day affixing said stamps to one sheet of its stock transfer record for April 23, 1940.

10. On or about June 11, 1943, and within the four-year period prescribed by Sections 3304(c) and 3313 of the Internal Revenue Code (26 U.S.C. 3304(c), 3313), plaintiff duly filed with defendant a claim for refund of said taxes and for redemption of said stamps, together with statement in support of this claim. A copy of said claim and statement is attached hereto as Exhibit A, and is incorporated by reference herein.

11. By letter dated March 9, 1944, and mailed on or about that date, the Commissioner of Internal

Revenue notified defendant of the disallowance of said claim. A copy of said letter of disallowance is attached hereto as Exhibit B, and is incorporated by reference herein.

12. The Interstate Commerce Commission, pursuant to power [4] conferred upon it by the Interstate Commerce Act, has prescribed a uniform system of accounts for steam railroads for use by such railroads in preparing balance sheets and also in submitting annual reports to the Commission. The Commission's duly issued and published regulations applicable at the time plaintiff's par value stock was exchanged for no par value stock on April 23, 1940, provided for an account entitled "Capital Stock", numbered 751, and stated that when stock certificates issued by a carrier "have a par value they shall be included in this account at par value". Said regulations further provided for an account, numbered 753, entitled "Premium on Capital Stock" in which was to be included "the excess of the actual money value of the consideration received for stock actually issued . . . over the par value of such stock". In addition, they stated: "When stock having par value is exchanged for stock without par value, sums resting in the . . . premium account for the subclass of stock retired shall be cleared to this account (No. 751) to the extent of the premium . . . applicable to the shares retired". The forms prescribed by the Commission show that these two items, 751 and 753, were merely sub-accounts of one general account entitled "Stock", and were to be added to-

gether to produce "Total Stock". Thus, the forms prescribed by the Commission for balance sheets and the forms issued by the Commission for annual reports to it were set up in the following form, insofar as here pertinent:

STOCK

751 Capital stock	XX
753 Premium on capital stock	XX
Total Stock	XX

13. Pursuant to said regulations of the Commission, plaintiff's capital stock account, prior to the exchange of no par stock of April 23, 1940, as shown in its balance sheet for March 31, 1940 (copy of the pertinent page of which is attached hereto as Exhibit C, and incorporated by reference herein), was [5] set forth as follows:

Stock

751 Capital Stock	\$377,276,305.64
753 Premium on Capital Stock	6,304,845.00
Total Stock	\$383,581,150.64

Plaintiff's capital stock account prior to the above exchange was also shown in identical form in its annual report to the Interstate Commerce Commission, except that the figures in cents were not shown. Thus, the pertinent page of such report for the year 1940 (copy of which is attached hereto as Exhibit D and incorporated by reference herein), in the left hand column thereof, entitled "Balance

at beginning of year" carried this account as follows:

Stock

751 Capital Stock	\$377,276,306
753 Premium on Capital Stock	6,304,845
Total Stock	\$383,581,151

14. The sub-account 751, entitled "Capital Stock", set forth in the preceding paragraph, represented the total par value of plaintiff's then outstanding capital stock. The facts giving rise to the \$6,304,845 item in the sub-account entitled "Premium on Capital Stock", set forth in the preceding paragraph, are as follows:

Under the terms of Article Four of an indenture dated June 1, 1909 between plaintiff and Guaranty Trust Company of New York securing an authorized issue of \$82,000,000 of plaintiff's Four Per Cent 20-Year Gold Bonds, the holders of such bonds were given the privilege, on or before June 1, 1919, of converting their bonds into paid-up shares of plaintiff's common stock at the rate of \$130 par value of bonds for each \$100 par value of stock. Pursuant to this provision, during 1910 and 1911, bonds in the total par value of \$662,090 were surrendered and 5,093 shares of stock [6] having a total par value of \$509,300 were issued by plaintiff in exchange. The excess of the amount of the bonds over the par value of the capital stock issued was thus \$152,790. In 1919 further bonds having a par value of \$26,657,150 were exchanged for 205,055 shares of capital stock having a total par

value of \$20,505,000. The excess of the amount of such bonds over the par value of the capital stock issued was \$6,151,650. Under another indenture dated May 1, 1929 between plaintiff and Guaranty Trust Company of New York plaintiff issued its 40-year 4½ Per Cent Gold Bonds of 1929, which bonds had warrants attached entitling the owner to purchase, on or before May 1, 1934, three shares of plaintiff's \$100 par value stock at \$145 per share plus adjustment of accrued dividends. During 1930, under these warrants, nine shares of plaintiff's capital stock having a total par value of \$900 were issued in return for a total purchase price of \$1305. The excess of the amount received over the par value of the capital stock issued in this last transaction was \$405. The several excesses of the amounts received over the par value of the stock issued in return in the above transactions, totaling \$6,304,845, were, prior to the stock exchange of April 23, 1940, carried, as aforesaid, in plaintiff's general capital stock account under sub-account 753, "Premium on capital stock." This was pursuant to the accounting regulations of the Interstate Commerce Commission, set forth in paragraph 12 hereof, requiring such excess amounts to be carried in such sub-account. Pursuant to the same regulations, the par value of all capital stock issued in such transactions was shown, together with the par value of all other capital stock issued, in plaintiff's general capital stock account under sub-account 751, "Capital Stock".

15. Pursuant to the Commission's regulations set forth in paragraph 12 hereof, plaintiff's capital

stock account, subsequent to the exchange of no par stock for par value stock on [7] April 23, 1940, as indicated in its balance sheet for April 30, 1940 (copy of the pertinent page of which is attached hereto as Exhibit C-1 and incorporated by reference herein), was shown as follows:

Stock

751	Capital Stock	\$383,581,150.64
753	Premium on Capital Stock
	Total Stock	\$383,581,150.64

Plaintiff's capital stock account subsequent to the above exchange was also shown in identical form in its annual report to the Interstate Commerce Commission for 1940, except that the figures in cents were not shown. Thus, the pertinent page of such report, as shown in the right hand column of Exhibit D, entitled "Balance at close of year", carried this account as follows:

Stock

751	Capital Stock	\$383,581,151
753	Premium on Capital Stock
	Total Stock	\$383,581,151

16. The only change occasioned in plaintiff's accounts by the stock exchange of April 23, 1940, was the merger, in accordance with the Commission's regulations referred to in paragraph 12 hereof, of sub-account 753 into sub-account 751. There was no change in plaintiff's surplus account, no change in the number of shares of stock outstanding, and no

change in the "total stock" account prescribed by the Commission.

17. The Commissioner of Internal Revenue in his letter of March 9, 1944 rejecting plaintiff's claim for refund (Exhibit B hereto) has held that said capital stock stamp tax imposed by Sections 1800 and 1802(a) of the Internal Revenue Code became due with respect to the entire 383,581,150.64 amount carried in [8] plaintiff's sub-account 751 (capital stock) as a result of the change of plaintiff's stock on April 23, 1940 from \$100 par value shares. The effect of this holding was to require payment of said tax upon the actual value of the entire 3,772,763.0564 no par shares then issued, and the tax paid by plaintiff to defendant, as indicated in paragraph 9 hereof, was calculated and paid on such basis. The Commissioner, in so ruling in said letter of disallowance, took the position that the \$6,304,845 item carried prior to April 23, 1940 in plaintiff's sub-account 753, styled "Premium on Capital Stock", was not an item in plaintiff's capital stock accounts, and that when such amount was transferred to sub-account 753, "Capital Stock", as a result of the exchange of stock, there was a dedication of additional capital. The Commissioner, therefore, held that the transaction was not within the provision of Section 113.25 of Regulations 71 (1941 Edition) (set forth in paragraph 5 hereof), which exempts from tax "the issue of stock in a recapitalization or reorganization where there is no dedication of additional capital either by transfer of earned surplus or otherwise." The

Commissioner further took the position that tax was due with respect to said entire \$383,581,150.64 amount because:

“The new capital and the old capital were intermingled in such a way that it is impossible to allocate to specific shares the increase in the capital stock accounts. Each share, therefore, represents both tax-paid and non tax-paid capital.”

18. In fact, the exchange by plaintiff of its no par value stock for its par value stock as above mentioned, was not an original issue, in the amount of \$383,581,151 or in any amount, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by plaintiff, within the meaning of Section 1802(a) of the Internal Revenue Code; such exchange occurred without plaintiff's capital being increased, either by transfer of [9] surplus to capital account, or otherwise, and such exchange occurred without dedication of additional capital, either by transfer of earned surplus, or otherwise.

19. The collection by defendant of said stamp taxes from plaintiff upon the issuance by plaintiff of its no par stock, as aforesaid, and the disallowance by the Collector of Internal Revenue of plaintiff's claim for refund with respect to such payment were erroneous, arbitrary and without authority of law.

20. Insofar as defendant collected stamp taxes upon, and insofar as the Commissioner disallowed

plaintiff's claim for refund with respect to such collection of taxes upon, that portion of the said issue of no par stock represented by the \$6,304,845 sub-account entitled "**Premium on capital stock**" which was transferred at the time of issuance to the "Capital stock" sub-account, defendant and said Commissioner acted erroneously, arbitrarily and without authority of law in the following particulars:

A. They disregarded the applicable accounting regulations, classifications and forms of the Interstate Commerce Commission, set forth in paragraph 12 hereof, under which both the premium sub-account and the capital stock sub-account were parts of plaintiff's general capital stock account, and under which the transfer of said item from the former sub-account to the latter sub-account as the result of said issuance did not result in any dedication of additional capital;

B. As a result of such disregard they failed to conclude that said issue occasioned "no dedication of additional capital" and that the issue was therefore exempt from tax under the provisions of Section 113.25 of Regulations 71 (1941 Edition) (set forth in paragraph 5 hereof), as was the case;

C. They regarded said Section 113.25 of Regulations 71 [10] (1941) Edition) as applicable in the premises rather than Article 29 of Regulations 71 (1932 Edition) (set forth in paragraph 5), even though the former regulations were not adopted until after the date of issuance of the no par stock;

D. They failed to conclude that said exchange was "effected without the capital being increased"

within the meaning of said Article 29 of Regulations 71 (1932 Edition), and was therefore exempted from tax by virtue of its provisions, as was the case; and

E. They failed to conclude that such transaction was not an "original issue" within the meaning of Section 1802(a) of the Internal Revenue Code and therefore not taxable under its provisions.

21. Insofar as defendant collected taxes upon, and insofar as the Commissioner disallowed plaintiff's claim for refund with respect to such collection of taxes upon, the remaining portion of said issue of no par stock, defendant and said Commissioner acted erroneously, arbitrarily and without authority of law in the following particulars:

A. They failed to take account of the fact that irrespective of whether the issuance of the portion of the no par stock referred to in paragraph 20 hereof could be considered as resulting in an addition to capital, which plaintiff denies, the issuance of the remaining stock did not so result, since such stock represented the \$377,276.305.64 amount carried, as hereinbefore indicated, in plaintiff's capital stock sub-account both before and after said issuance:

B. They therefore failed to conclude that in any [11] event the issuance of said portion of the stock was made "without the capital of the corporation being increased" and resulted in "no dedication of additional capital" within the meaning respectively of Article 29 of Regulations 71 (1932 Edition) and Section 133.25 of Regulations 71 (1941 Edition), and was therefore exempt from

tax by virtue of the provisions of said regulations, as was the case;

C. They failed to conclude that, in any event, under settled judicial rulings the issuance of said portions of the stock was not an "original issue" within the meaning of Section 1802(a) of the Internal Revenue Code and therefore not taxable under its provisions;

D. They concluded that the issuance of said portion of the stock was taxable because new capital and old capital may have been intermingled, when there is no authority either in law or in the Commissioner's regulations for taxing a part of an issue not independently resulting in dedication of new capital and thus not independently taxable as an original issue merely because it may be intermingled with a portion which might result in the dedication of new capital and thus be taxable;

E. They failed to follow the practice of the Commissioner in other cases, including one in this judicial circuit, of making a segregation between the part of an issue not taxable as an original issue and the part taxable as an original issue, and taxing only the former part. Especially is such failure arbitrary, where the only portion of the issue which could conceivably be regarded as resulting in dedication of new capital, namely, that represented by the \$6,304,845 item in plaintiff's premium sub-account, was less than 2% of the total of [12] plaintiff's capital stock account after the issuance; and

F. They failed to conclude that in taxing said portion of the issue representing, beyond doubt, old

capital, with respect to which the original issues either occurred prior to the effective date of the Revenue Act of 1926 (the basis of Section 1802(a) of the present Internal Revenue Code), and in many instances were subjected to tax under earlier stamp taxes, or occurred after the effective date of said Act, and have already been taxed thereunder, they were subjecting plaintiff to arbitrary, retro-active and multiple taxation.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$46,687.95 with interest thereon from February 26, 1943, as provided by law, for the costs of this suit, and for such other and further relief as to the court may seem proper.

/s/ GEORGE L. BULAND,

Counsel for Plaintiff. [13]

State of California,

City and County of San Francisco—ss.

H. J. Carroll, being first duly sworn, deposes and says:

That he is an officer, to-wit, Secretary of Southern Pacific Company, the plaintiff in the above-entitled action, and makes this verification for and on behalf of said plaintiff; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge.

H. J. CARRALL.

Subscribed and sworn to before me this 9th day of February, 1946.

(Seal)

A. L. WHITTLE,

Notary Public in and for the City and County of San Francisco, State of California. [14]

EXHIBIT A

Form 843

Treasury Department
Internal Revenue Service
Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund or Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of San Francisco—ss.

Name of taxpayer or purchaser of stamps:
Southern Pacific Company.

Business address: 65 Market Street, San Francisco, California.

Residence: A Kentucky corporation.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed.
No return filed. Stamps purchased from Collector

of Internal Rev., 1st District, San Francisco.

* * * *

3. Character of assessment or tax original issue documentary stamp tax under Sec. 1802(a) of Internal Revenue Code as amended.

* * * *

5. Date stamps were purchased from the Government February 26, 1943.

6. Amount to be refunded forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95).

* * * *

The deponent verily believes that this claim should be allowed for the following reasons: Sec. 3304 of the Internal Revenue Code as amended (Sec. 1 of Act of May 12, 1900, 31 U. S. Stat. 177, as amended by Sec. 1013(a) of the Revenue Act of 1924, 43 U. S. Stat. 343). For reasons stated in rider attached hereto.

(Stamps are attached to stock transfer record of April 23, 1940, and may be inspected at Room 662, 65 Market Street, San Francisco, Calif.)

SOUTHERN PACIFIC CO..

/s/ F. L. McCAFFERY,

General Auditor.

Sworn to and subscribed before me this 11th day of June, 1943.

A. L. WHITTLE,

Notary Public.

[15]

STATEMENT IN SUPPORT OF ANNEXED REFUND CLAIM

1. The Commissioner of Internal Revenue by letter dated July 15, 1942, addressed to Internal Revenue Agent R. C. Cannedy at Los Angeles, California, has ruled that original issue stamp tax became due under Section 1802(a) of the Internal Revenue Code, as amended, with respect to the entire \$383,581,150.64 carried in Southern Pacific Company's capital stock account, as a result of the change of said Company's stock in April, 1940, from \$100 par value shares to no par shares. The position taken by the Commissioner was that the Company's capital stock account immediately following the change to no par stock was increased by \$6,304,845, formerly styled "Premium on Capital Stock"; that this amount represented capital with respect to which no previous issue tax had ever been paid; and his ruling was that the tax was due with respect to the full amount of \$383,581,150.64 in the capital stock account because "the new capital and the old capital were intermingled in such a way that it cannot be said that the increase in the capital stock account can be allocated to specific shares." Demand was made upon the Company for payment of the issue tax with respect to the entire amount in the capital stock account following the change to no par shares.

2. On or about February 26, 1943, Southern Pacific Company purchased from Harold A. Berliner, Collector of Internal Revenue, First District, San Francisco, California, revenue stamps in the

amount of forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95), and on the same day affixed said stamps to one sheet of the Company's stock transfer record for April 23, 1940. The purchase of the stamps [16] was made under protest.

3. Section 1800 of the Internal Revenue Code provides for the imposition of a tax in accordance with the provisions of Section 1802 of the Code, as amended, which, at the time of the transaction herein referred to, provided as follows:

“Sec. 1802 Capital Stock (and similar interests).

(a) Original Issue. On each original issue, whether on organization or reorganization, of shares or certificates of stock, * * * on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation, * * *, 10 cents; provided, that where such shares or certificates are issued without par or face value, the tax shall be 10 cents per share * * *, unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the discount shall be 2 cents on each \$20, of actual value, or fraction thereof, of such certificates, (or of the shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stockbooks or corresponding records

of the organization and not to the certificates issued.”

It is the company’s contention, for reasons explained below, that the exchange of par for no par stock is not an original issue under the provisions of Section 1802(a).

The company also contends that the issue is exempt under Article 29(i) of Regulations 71 (1932 Edition), as well as Section 113.25 of Regulations 71 (1941 Edition).

Article 29 of Regulations 71 (1932 Edition) provides that:

“The following are examples of issues not subject to the tax:

* * * *

(i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected without the capital of the corporation being increased, either by transfer of surplus to capital account, or otherwise.”

Section 113.25 of Regulations 71 (1941 Edition) provides as follows:

“* * * the following are examples of issues not subject to tax: [17]

* * * *

(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise.”

4. Southern Pacific Company had total stock outstanding as set forth in the capital stock ac-

counts in the amount of \$383,581,150.64 immediately prior to the change from par value to no par stock. Under the accounting procedure prescribed by the Interstate Commerce Commission, when a railroad company has outstanding capital stock of a stated par value which has been issued at a premium, it is required to set forth such capital as follows: (a) the par value in an account entitled No. 751 "Capital Stock" and (b) the premium in an account entitled No. 753 "Premium on Capital Stock." Both items are capital stock accounts and added together they make up the Company's "Total Stock." Under the mandatory requirement contained in the Interstate Commerce Commission's accounting classifications, when stock having a par value is exchanged for stock without par value, sums in the premium account (No. 753) are transferred to Account No. 751. When the change from par value to no par value was made in the case of Southern Pacific Company stock, this change was made in accordance with required practice. The general "Capital Stock" caption, however, in balance sheet classification prescribed by the Interstate Commerce Commission showed no change in total. The two sub-accounts were merely merged into one general capital stock account, and there was no change in the Company's surplus account and no dedication of additional capital as a result of the change of the stock certificates from par to no par.

5. The facts giving rise to the \$6,304,845 "Premium on Capital [18] Stock" are as follows:

Under the terms of Article Fourth of an indenture dated June 1, 1909, between Southern Pacific Company and Guaranty Trust Company of New York, securing an authorized issue of \$82,000,000 of the Company's Four Per Cent 20-Year Gold Bonds, the holders of such bonds were given the privilege of converting their bonds into paid-up shares of common stock of the Company at the rate of \$130 par value of bonds for each \$100 par value of stock on or before June 1, 1919. In April, 1909, an amendment to the Charter of the Company had been made authorizing the capital stock to be increased by \$100,000,000, and \$63,000,000 par value of the increased stock was set aside and reserved for the purpose of making the conversion of the said bonds into capital stock.

The Southern Pacific Company annual reports for 1910 and 1911 show that up to January 9, 1912, \$662,090 par value of said bonds were surrendered and \$509,300 par value of stock was issued in place thereof, i.e., bonds of a par value of \$662,090 were exchanged or paid for 5,093 shares of the capital stock of the Company having a par value of \$100 per share. To comply with Interstate Commerce Commission accounting practice there was a segregation within the stock accounts of the amount of the par value of 5,093 new shares (\$509,300) and the said \$152,790 excess "Premium on Capital stock," but the full \$662,090 representing the exchange price of the 5,093 shares was set up in the capital stock accounts. There was no law taxing the original issue of certificates of stock during the

years (1910 and 1911), when the above conversions were made, so that no tax was payable on the original issue of these 5,093 shares.

There were no more conversions of the Four Per Cent Bonds into shares of stock until May, June and July, 1919. During these months, however, bonds of a par value of \$26,657,150 were turned in and the Company issued in place thereof 205,055 shares of capital stock each share having a par value of \$100 (total par value \$20,505,500). The \$20,505,500 representing the par value of the new shares which were issued was set up in the capital stock accounts along with the \$6,151,650 excess of the face value of said bonds which were surrendered over the par value of said shares. Thus, 205,055 shares of \$100 par value stock were issued for a consideration of \$26,657,150, and the full \$26,657,150 went into the capital stock accounts, although it was divided into two sub-items to comply with Interstate Commerce Commission accounting procedure. Unlike the situation in 1910 and 1911 when a few of the bonds were exchanged for shares of stock as above set forth, at the time the 205,055 shares were issued in exchange for the bonds in 1919, there was a Federal documentary stamp tax on the original issue of stock. The War Stamp Taxes Law (Title VIII of "An Act to Provide Revenue to Defray War Expenses, and for Other Purposes," approved October 3, 1917 (Public—No. 50—65th Congress)) provided: [19]

"Original Issue of Stock. 3. Capital stock, issue: On each original issue, whether on organization or

reorganization, of certificates of stock by any association, company, or corporation, on each \$100 of face value or fraction thereof, 5 cents:

“Provided, That where capital stock is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of \$100 per share, in which case the tax shall be 5 cents on each \$100 of actual value or fraction thereof.

“The stamps representing the tax imposed by this subdivision shall be attached to the stockbooks and not to the certificates issued.”

In accordance with the law, revenue stamps at the rate of 5 cents on each \$100 of par value of the 205,055 shares of \$100 par value stock were purchased by Southern Pacific Company and actually attached to the stock books, the said stamps costing \$10,252.75. That the face amount of the bonds which were exchanged for the 205,055 shares was a figure in excess of the par value of said shares is of no consequence in so far as the stamp tax is concerned for the fact is that the law required payment of the tax on the issuance of par value stock at the rate of 5 cents on each \$100 of face value or fraction thereof. Tax at such rate was paid on the full amount of the shares which were issued in accordance with the law then in effect, and the full proceeds from the issuance of these shares (both the \$20,505,500 par value of the stock and the \$6,151,650 so-called “Premium”), although separated as sub-items in accordance with Interstate Commerce Commission accounting practice,

were set up in the Company's capital stock accounts.

The Remaining \$405 of the \$6,304,845 premium item in the capital stock account prior to the change from par value to no par value came about as follows:

Under an indenture dated May 1, 1929, between Southern Pacific Company and Guaranty Trust Company of New York, Southern Pacific Company issued its 40-Year 4½ Per Cent Gold Bonds of 1929, which bonds had warrants attached entitling the owner to purchase on or before May 1, 1934, three shares of Southern Pacific Company's \$100 par value stock at \$145 per share, plus adjustment of accrued dividends. A total of nine shares of Southern Pacific Company's stock was purchased under this warrant in the year 1930 prior to the great drop in security prices, and, in accordance with Interstate Commerce Commission accounting practice, the full \$1,305 purchase price was put in the capital stock accounts, divided, as in the instances set forth above, to show the \$900 of par value of said shares in one sub-item and the \$405 premium over and above the par value in another sub-item called "Premium on Capital Stock."

At the time of this transaction in 1930 the original issue tax was 5 cents on each \$100 of face value or fraction thereof where capital stock had a par or face value (Title VIII, Revenue Act [20] of 1926, as amended). The correct amount of revenue stamps were affixed to the stock books of the Company at the time these nine shares were issued.

It is submitted on the above facts that the \$6,304,845 was from the beginning an entry in the capital stock accounts of the Company representing a portion of the consideration paid for shares of capital stock issued, and that the full amount of the original issue tax was paid as required by law when the said certificates were issued.

The premium (except the small amount received when there was no stamp tax levy) was realized upon tax paid issuance of capital stock. Upon original issue the stamp tax was paid pursuant to law, although the premium was not included in the computation of the tax paid or tax free capital, and it is contended that reissue of these shares is non-taxable. The premium received on shares issued when there was no capital stock tax, constitutes capital on which no tax was due upon original issue and none is due upon reissue.

6. The transfer of the \$6,304,845 of so-called "Premium on Capital Stock" did not represent an increase in the capital stock account or a dedication of new capital by transfer of earned surplus or otherwise. There was no new contribution to the capital stock by the stockholders and no part of the corporate surplus was assigned to capital accounts. Prior to the change from par to no par shares, the total amount in the said capital stock accounts was \$383,581,150.64 after the change to no par shares, the amount in said accounts was still \$383,581,150.64. Prior to the change from par to no par shares, the total corporate surplus was \$373,381,196.20; after the change to no par shares,

the total corporate surplus was still \$373,381,196.20. [21] The change from par to no par was nothing more than a change in the form of the certificates. There was no revaluation of the properties of the Company with appreciation thereof and increase in values transferred to capital account. There was no change in the assets of the Company and no change in the interests of the shareholders. This was an exact exchange; the capital account which represented the new issue was exactly the same as the capital account representing the old issue. There was no change of ownership and no new shares were created. The rights of the stockholders were neither increased nor lessened by the change from par value stock to no par. It is true that the capital stock accounts of the Company were subdivided in the case of par value stock so as to show the par value as one item and premium on capital stock in another item. This subdivision is a mandatory requirement of the Interstate Commerce Commission. It would seem manifestly unjust for one branch of the Federal Government, the Treasury Department, to exact the tax here involved from a taxpayer on its entire capital stock because the taxpayer has followed the mandatory requirements of another branch of the Federal Government, the Interstate Commerce Commission, in subdividing its capital stock accounts. The substance of the matter, rather than the form, should be the determining factor. Here the new shares of no par value represented exactly the same net assets of the original issue: no new capital was brought

into the net assets of the Company by virtue of the transaction. Under the circumstances, the stamp tax is not payable.

Cleveland Provision Co. v. Weiss, 4 F (2d) 408;

Edwards v. Wabash Ry. Co., 264 F. 610; [22] West Virginia Pulp & Paper Co. v. Bowers, 293 F. 144, affirmed 297 F. 225;

The Bailey Co. v. Routzahn, 1 USTC Par. 112; The Cuba Railroad Co. v. U. S., 1 USTC Par. 114; 60 Ct. Cls. 272;

In re Grant-Lees Gear Co., 1 F. (2d) 393;

Bureau ruling dated May 10, 1940, Par. 6281, 403 CCH.

Judge Westenhaver's explanation in the Cleveland Provision Case *supra*, of the facts in the W. Virginia Pulp Case is particularly apt. Apparently in the Pulp case there were two exchanges, the second of which was an exchange of one \$100 par share for four no-par shares. Judge Westenhaver stated that an examination of the record in the Pulp case showed that the questions whether the no par value certificates were original issues, whether the answer depends on the nature or kind of the re-issued shares, whether a less tax was collected from shares originally issued than would have been on reissued no par shares, had all been clearly and forcibly presented. Yet the second circuit decided in a *per curiam* opinion that no tax was due. Furthermore, in the Cleveland Provision case, the court stated that "it is also immaterial that the stamp taxes would have been greater had the corporation

done originally that which it did in making this exchange of certificates.”

There is a Ninth Circuit case—*Rio Grande Oil Company vs. Welch* (101 F. (2d) 454)—which appears to support the proposition that an exchange of par and no par stock involving a transfer of surplus to capital account, is subject to stamp tax. An examination of the record in this case, however, shows clearly (1) that the decision is limited to the tax on the amount of an increase in capital occasioned [23] by a transfer of surplus, and (2) that the tax on a number of shares representing the original capital account had been assessed by the Commissioner and later upon claim for refund had been abated as having been “erroneously” assessed.

In 1928 *Rio Grande Oil Company* authorized the exchange of its outstanding 240,000 \$25.00 par shares of capital stock for 1,200,000 no par shares. The par shares had been carried at \$6,000,000 as the only item in the capital account. The company revalued its assets and transferred (1) \$32,538,744.62 from surplus (appreciation of property and paid-in surplus) and (2) the amount of \$6,000,000 in its original capital account, to a new capital account totaling \$38,538,744.62.

An examination of the record in this case in the Ninth Circuit reveals the following facts which do not appear in the opinion:

In January, 1933, the Commissioner assessed a stamp tax of \$19,269.38 on the 1,200,000 no-par shares, taking as the value of the no-par shares

the amount of the new capital account \$38,538,-744.62 and dividing it by 1,200,000 shares, resulting in a value of \$32.12 minus for each no-par share. On May 26, 1933, a claim for abatement filed by the company was allowed by the Commissioner in the amount of \$3,000 and eventually rejected for the balance. Apparently the amount abated was the tax on a number of no-par shares whose aggregate value equaled the amount of the original par share capital account of which a stamp tax had previously been paid.

Upon a suit in the U. S. District Court for the Southern District of California, Central Division, the court held in an unreported [24] opinion that "the capital stock stamp tax on the increased amount over the original capital was proper" and the decision was affirmed by the Ninth Circuit.

In the brief filed by the Government in the Circuit Court it is stated:

"The tax was assessed by the Commissioner of Internal Revenue in the amount of \$19,269.38, and abated in the amount of \$3,000, as erroneously including 186,825 shares, or a proportionate amount of the 1,200,000 shares of no par value stock representing the outstanding \$6,000,000 capital stock liability of appellant on December 31, 1928".

The brief further states:

"While no dispute exists as to the amount of tax per share, or the rate employed in computing the tax in question, nevertheless, a further analysis of the findings of the District Court discloses that the assessment of tax, amounting to \$19,269.38 was

erroneously computed on the basis of 1,200,000 shares with an actual value of \$38,538,744.62; whereas, the tax in question, in this and the companion case, amounting to \$16,269.38, is apparently computed on the basis of 1,013,175 shares with an actual value of \$32,538,744.62, or 1,200,000 shares with an increase in value of that amount over and above the \$6,000,000 outstanding capital stock liability of appellant on December 31, 1828.

In other words, the Commissioner of Internal Revenue abated \$3,000 of the amount assessed as erroneously including 186,825 shares, representing the \$6,000,000 outstanding capital stock liability of appellant, with the result that the stamp taxes in question in the instant case and its companion case, amounting to \$16,269.38, were only imposed upon the issue of the 1,013,175 shares, or that portion of the 1,200,000 shares representing the \$32,538,744.62 increase in the capital or capital stock liability of appellant corporation."

In making a partial allowance of the claim for abatement the Commissioner merely took the amount of the original par value capital account of \$6,000,000 and divided it by \$32.12 minus (the value of a no par share) to arrive at the 186,825 shares representing the original capital on which stamp tax was abated. This is contra the [25] Commissioner's contention that, because of the "intermingling" of "the new capital and the old capital", tax is due on stock representing the entire capital account.

Even in a case which involved a reappraisal of assets and a transfer of surplus the Commissioner

abated stamp taxes to the amount of capital on which tax had originally **been paid**.

This case is in keeping with the recent modification of S.T. 899. (See M.T. 8 (43 CCH Par. 6299)).

7. The transfer books of Southern Pacific Company at New York contain the stamps representing payment of the original issue tax imposed upon the certificates of stock actually paid for in part by \$6,152,055, of the so-called "Premium on Capital Stock"; the remaining \$152,790 of the \$6,304,845 of "Premium" represented a portion of the purchase price of shares issued prior to the time such a stamp tax was in effect. The full \$6,304,845 can be allocated to specific shares by tracing through the books of the Transfer Agent of Southern Pacific Company in New York City, and said books show payment in full of all taxes due with respect to the original issuance of said shares.

8. In view of the above it is respectfully submitted that the issue of no par shares of Southern Pacific Company stock is not subject to stamp tax; the purchase of the stamps in the amount of forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95) under protest was erroneous and improper; and the cost of the stamps with interest from date of purchase should be refunded to Southern Pacific Company. [26]

Treasury Department
Washington 25

March 9, 1944

Office of Commissioner of Internal Revenue
Refer to MT:M:HB Cl. C-20191.

Southern Pacific Company,
65 Market Street,
San Francisco, California.

Gentlemen:

Your claim for redemption for used documentary stamps in the amount of \$46,687.95 has been examined.

The facts in the case show that your corporation, prior to the amendment of its articles of incorporation in April 1940, had common stock with a par value of \$100.00 per share outstanding in the total amount of \$377,276,305.64. The amendment of the articles of incorporation changed the shares of capital stock from \$100.00 per value per share to no par value common stock. No additional shares were issued after the amendment and the only other change was a transfer of \$6,304,845.00 from "Premium on Capital Stock Account" to the common stock account. To effect the change, a journal entry was made closing out the old common stock and two accounts called "Premium on Capital Stock", having a balance of \$405.00 and "Premium on S. P. Company Common Stock issued in Exchange for S. P. Company 4 per cent Convertible Bonds" having a balance of \$6,304,-

440.00 which were transferred to the new no par value common stock account, making a total credit to that account of \$383,581,150.64.

It is your contention that there was no increase in the capital stock account at the time of the change from par to no par value shares. You state that under the accounting procedure prescribed by the Interstate Commerce Commission, when a railroad company has outstanding capital stock of a stated par value which has been issued at a premium, it is required to set forth such capital in two accounts, (a) the par value in an account entitled No. 751 "Capital Stock" and (b) the premium in an account entitled No. 753 "Premium on Capital Stock". You argue therefore that both accounts are capital stock accounts and added together make up the company's "total stock". You state also that, under the requirements of the Interstate Commerce Commisison, it was necessary to transfer the amounts previously carried as "Premium on Capital Stock" to the new common stock account when the stock was changed from par value to no par value. You contend therefore that the "premium" of \$6,304,845.00 was from the beginning "an entry in the capital stock accounts on the company's books, representing a portion of the consideration paid for shares of capital stock issued, and that the full amount of the original issue tax was paid as required by law when the certificates were issued." [27]

In your statement in support of your claim you set forth the facts showing the manner in which

the "premium" accounts were created. In 1909 certain bonds were issued by your company which gave the holders thereof the privileges of converting their bonds into paid-up shares of common stock of the company at the rate of \$130.00 par value of bonds for each \$100.00 par value of stock on or before June 1, 1919. Up to January 9, 1912, \$662,090.00 par value of the said bonds were surrendered and \$509,300.00 par value of stock was issued in place thereof, i.e., bonds of a par value of \$662,090.00 were exchanged or paid for 5,093 shares of the capital stock of the company having a par value of \$100.00 per share. The excess of the par value of the bonds over the par value of the stock, namely, \$152,790.00 was entered in the "Premium on Capital Stock Accounts". In 1919, bonds of a par value of \$26,657,150.00 were turned in and the company issued in place thereof 205,055 shares of capital stock, each share having a par value of \$100.00 (total par value \$20,505,500.00). The excess of the par value of the bonds over the par value of the stock, namely, \$6,151,650.00, was credited to the "Premium on Capital Stock Account". The proper amount of stamp tax was paid upon the issuance of the shares of stock issued on the exchange, numbering 205,055 shares.

The remaining \$405.00 of the \$6,304,845.00 premium item came about in the following manner. In 1929 the Company issued certain bonds which had warrants attached thereto entitling the owners thereof to purchase on or before May 1, 1934, three shares of the company's \$100.00 par value stock at

\$145.00 per share, plus adjustment of accrued dividends. A total of nine shares of the company's stock was purchased pursuant to this arrangement in 1930 for a total price of \$1,305.00. The excess of \$405.00 over par was credited to the account "Premium on Capital Stock". Stamp tax was paid with respect to these shares.

It is held that the "premium" accounts so far as the stamp tax laws are concerned, are not "capital stock" accounts. Accordingly, the premium accounts represent capital never previously dedicated to a specific capital account. The original issue tax in the case of par value stock is computed upon the basis of units of par value of \$100.00 or fractional part thereof, of the certificates issued. When shares of stock are issued at a premium, the tax is computed not on the basis of the price received but on the par value of the certificates. The same is true where stock is sold at less than par. The selling price is immaterial in the case of par value stock, so far as the computation of the tax is concerned. In those cases, therefore, where stock is issued for an amount over par, this office holds that the excess represents non tax-paid capital.

With respect to your contention that the amount representing premium on sale of capital stock actually was a part of the capital stock account although carried in a separate account, it is held such an amount is paid in surplus. [28]

Section 113.25 of Regulations 71 (1941 Edition) sets forth various issues of stock not subject to stamp tax under section 1802(a) of the Internal

Revenue Code, as amended. Paragraph (f) of the above section states as an example of an issue not subject to tax: "The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise". The opposite is also true and where there is a dedication of additional capital, an issue tax is incurred. In the above-described transaction, additional capital was dedicated to the capital account. While no new certificates representing the no par shares have been issued to replace the old par value shares, it is clear that new shares have been created and the tax applies whether or not certificates were issued to represent such shares.

The new capital and the old capital were intermingled in such a way that it is impossible to allocate to specific shares the increase in the capital stock account. Each share, therefore, represents both tax-paid and non tax-paid capital. Accordingly, it is held, under section 1802(a) of the Code, that issue tax is due with respect to the entire amount transferred to the new no par value stock account, namely, \$383,581,150.64.

In view of the foregoing, your claim is hereby rejected.

Very truly yours,

JOSEPH D. NUNAN, JR.,

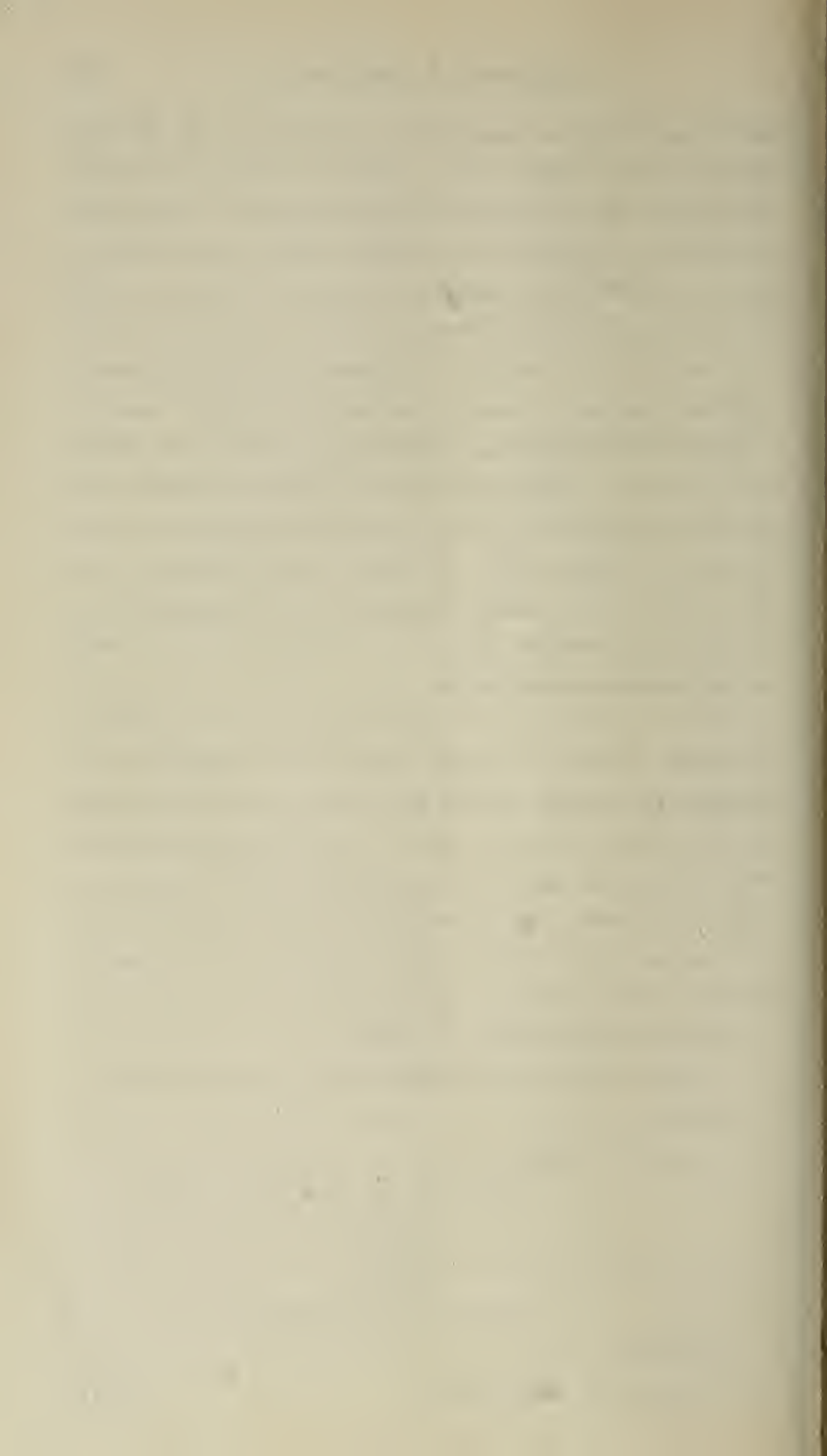
Commissioner.

By /s/ D. S. BLISS,

Deputy Commissioner.

cc—Collector

San Francisco, California.



SC. HERN PACIFIC COMP.,
BALANCE SHEET OF GENERAL LEDGER

ONLY IN CASE

[illegible]



[Title of District Court and Cause.]

ANSWER

Now Comes the United States of America by Frank J. Hennessy, United States Attorney, and for answer to the complaint filed herein admits, denies and states to the Court, as follows:

I.

Paragraph numbered "1" is admitted.

II.

Paragraph numbered "2" is admitted.

III.

Paragraph numbered "3" contains no material allegation of fact, but consists of statements of conclusions of law and, therefore, it does not require answering.

IV.

Paragraph numbered "4" contains no material allegation of fact, but consists of statements of conclusions of law and, therefore, it does not require answering.

V.

Paragraph numbered "5" is admitted.

VI.

Answering paragraph numbered "6", it is admitted that the plaintiff had outstanding on April 23, 1940, \$3,772,763.0564 shares of its capital [34] stock having a par value of \$100; but as to the balance of the paragraph, the defendant is without

knowledge or information sufficient to form a belief as to the truth of the averments.

VII.

Paragraph numbered "7" is admitted.

VIII.

Paragraph numbered "8" is admitted.

IX.

Paragraph numbered "9" is admitted.

X.

Paragraph numbered "10" is denied. Except it is admitted that on June 17, 1943, the plaintiff filed a claim for the redemption of used stamps in the amount of \$46,687.95, which it purchased on February 26, 1943 and the defendant admits that the Exhibit A to the complaint is a copy of such claim.

XI.

Paragraph numbered "11" is admitted.

XII.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered "12".

XIII.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered "13". However, the defendant says that notwithstanding any requirement of the Interstate Commerce Commis-

sion, the plaintiff has never paid a documentary stamp tax (other than that which it seeks to recover by this action) on any part of the amount of \$6,304,845, which it dedicated to its capital stock account and intermingled with the old capital in the amount of \$377,276,305.64, which resulted in an increased total capital stock account of \$383,581,150.64, and against which the new no par value stock was issued as alleged in paragraph numbered "7" of plaintiff's complaint. [35]

XIV.

Paragraph numbered "14" is admitted, except the two last sentences thereof, as to those sentences the defendant is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

XV.

Paragraph numbered "15" is denied. Except, it is admitted that in the exchange of its outstanding par-value stock for no-par value stock plaintiff's capital stock account was increased to \$383,581,150.64 by the dedication of the new capital in said amount of \$6,304,845.

XVI.

Paragraph numbered "16" is denied.

XVII.

Paragraph numbered "17" is admitted.

XVIII.

Paragraph numbered "18" is denied.

XIX.

Paragraph numbered "19" is denied.

XX.

Paragraph numbered "20" is denied.

XXI.

Paragraph numbered "21" is denied.

Wherefore, the defendant having fully answered the complaint herein prays that the plaintiff take nothing and that the defendant recover his costs.

FRANK J. HENNESSY,
United States Attorney.

By WILLIAM E. LICKING,
Assistant U. S. Attorney.

[Endorsed]: Filed July 30, 1947.

[36]

[Title of District Court and Cause.]

PETITION OF SOUTHERN PACIFIC COMPANY, A Delaware Corporation, to be Substituted as Plaintiff, in Place of Southern Pacific Company, a Kentucky Corporation.

Southern Pacific Company, a corporation organized and existing under the laws of the State of Delaware, respectfully shows to this court:

1. That this is an action for the recovery of stamp taxes paid by Southern Pacific Company, a Kentucky corporation, plaintiff herein, as more fully appears from the complain herein, a copy of

which is attached hereto, marked Exhibit A and made a part hereof.

2. That Southern Pacific Company, a Kentucky corporation, [37] plaintiff herein, by a written instrument dated September 30, 1947, a copy of which is attached hereto and marked Exhibit B, transferred and assigned to petitioner, under a Plan of Reincorporation, all its business, franchises, assets, and properties, including all its right, title, and interest in the claim asserted herein and that petitioner has ever since been and is now the lawful owner of the claim asserted herein; that after said reincorporation, the same stockholders were in control of petitioner as were in control of said Southern Pacific Company, a Kentucky corporation, and their stockholdings in petitioner were in the same proportion as their stockholdings in said Kentucky corporation.

3. That the following proceedings have been had in this action:

February 9, 1946—Complaint filed;

February 11, 1946—Summons served;

March 4, 1947—Defendant filed motion to strike certain allegations of the complaint;

June 25, 1947—Defendant's motion to strike denied by court;

July 30, 1947—Answer of defendant filed;

August 25, 1947—Case set for trial on November 20, 1947.

No further proceedings have been had in this action.

Wherefore, petitioner prays that an order be entered herein substituting it as party plaintiff herein in place of Southern Pacific Company, a Kentucky corporation.

Dated San Francisco, California, October 15, 1947.

/s/ GEORGE L. BULAND,
/s/ FRANK J. GALLAGHER,
Counsel for Plaintiff.

(Verification.)

(Here follows Exhibits "A" and "B".)

[Endorsed]: Filed Oct. 16, 1947.

[38]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION

It is ordered, that Southern Pacific Company, a Delaware corporation, be and it is hereby substituted as party plaintiff herein in place of Southern Pacific Company, a Kentucky corporation, and that the action be continued by and in the name of said Southern Pacific Company, a Delaware corporation, without prejudice to any proceeding already had in this action.

Dated Oct. 20th, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Oct. 20, 1947.

[39]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the above-entitled parties, by their respective attorneys, that the following facts shall be taken as true, each of the parties reserving the right to submit other and further facts not inconsistent with the facts herein stipulated.

1. Plaintiff is a corporation of the State of Delaware, incorporated on March 21, 1947, with its principal office in San Francisco, California, within the First Internal Revenue [40] Collection District of the State of California.

2. Plaintiff is the successor in interest to Southern Pacific Company, a Kentucky corporation, hereinafter referred to as the "Old Company". On September 30, 1947, it succeeded to all of the business and assets and assumed all of the liabilities of the Old Company under a Plan of Reincorporation involving a mere change in the state of incorporation, plaintiff having the same capital structure and the same number of issued and outstanding shares as the Old Company. After the reincorporation, the same stockholders were in control of plaintiff as were in control of the Old Company, and their stockholdings in plaintiff were in the same proportion as their stockholdings in the Old Company. On September 30, 1947, the Old Company, in accordance with the applicable statutes of the Commonwealth of Kentucky, filed with the Secretary of State of that Commonwealth notice

of its intention to dissolve. On October 20, 1947, by order of this Court the new company, the Delaware corporation, was substituted as plaintiff in this action in place of the Old Company.

3. At all times between January 1, 1943, and March 31, 1945, the defendant was the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Internal Revenue District of California, but is not now in office as such collector. Said defendant is a resident of the State of California and of the Southern Division of the Northern United States District Court District of said State.

4. The Old Company was incorporated under the laws of the Commonwealth of Kentucky on March 17, 1884, and continuously from said date to and including September 30, 1947, was engaged in business in interstate commerce as a common carrier by railroad. Between the date of its incorporation and April 23, 1940, the Old Company issued and had outstanding on the latter date 3,772,763.0564 shares of capital stock having a par value of \$100 [41] a share, of which 3,562,606.0564 shares were issued at par and 210,157 shares were issued at a premium of \$6,304,845 over par. A substantial part of said stock was issued during periods when Federal stamp taxes on the issuance of capital stock were in effect, and on all such parts of its outstanding capital stock the Old Company duly paid the Federal stamp taxes then in effect.

5. By an amendment of the Old Company's Charter or Certificate of Incorporation, duly auth-

orized by the stockholders of the Old Company at a meeting duly called and held on April 3, 1940, and duly filed and recorded in the office of the Secretary of State for the Commonwealth of Kentucky on April 22, 1940, the structure of the Old Company's capital stock, consisting of 5,944,518 common shares of the par value of \$594,451,800, of which 3,772,763.0564 shares were issued and outstanding and 2,171,754.9436 shares were unissued, was changed to the same number of shares without nominal or par value. 3,772,763.0564 shares of said no par value stock were issued and exchanged with the Old Company's stockholders for the 3,772,763.0564 shares of par value stock then outstanding. In connection with said amendment, and in connection with the issuance and exchange of said stock as above stated, no new money was paid in and no property was transferred to the Old Company.

6. The par value shares of capital stock of the Old Company issued and outstanding as of the date of said exchange represented the entire net beneficial interest in all of the assets of the Old Company before the amendment of its charter as referred to in the foregoing paragraph 5, and after said amendment and issuance of said certificates representing 3,772,763.0564 shares of no par value in exchange for said par value shares, the persons receiving the new shares remained the owners of the said entire beneficial interest in the same assets of the Old Company, and in the same proportion and not otherwise. [42] At the time of said amendment of the Old Company's charter providing for

the said no par stock, the earned surplus of the Old Company as shown by its books, was \$378,126,243, and there was no transfer of any part of said earned surplus to capital.

7. Said amendment to the charter of the Old Company reads as follows:

“AMENDMENT

To Charter or Articles of Incorporation Changing the Capital Stock of Southern Pacific Company.

I, A. D. McDonald, the President of Southern Pacific Company, a Kentucky corporation, and we, the undersigned, a majority of the Board of Directors of Southern Pacific Company, with the consent in writing of the owners of more than two-thirds of its capital stock, and being hereunto specially authorized by vote of stockholders of said Company representing and holding more than two-thirds in amount of the capital stock of said Company at a legal meeting of said stockholders duly convened and held at the principal office of the Company at Spring Station, Woodford County, Kentucky, on the 3rd day of April, 1940, pursuant to and after notice of such meeting and of the purposes thereof given in the manner and for the time prescribed by law and the by-laws of said Company, do hereby certify and state that the Charter or Articles of Incorporation of Southern Pacific Company are amended, and its capital stock is changed as follows:

That the authorized capital stock of said Company consisting of 5,944,518 common shares of the

par value of \$594,451,800, of which 3,772,763.0564 shares are issued and outstanding, and 2,171,754.9436 shares are unissued, be changed into the same number of common shares without nominal par value;

That 3,772,763.0564 shares of said shares without nominal par value be substituted, share for share, for the said presently issued and outstanding shares of the par value of one hundred dollars (\$100) each;

That the unissued 2,171,754.9436 shares of said authorized shares without nominal par value may be issued by the Company from time to time in such amounts, upon such terms, for such proper corporate purposes, and for such consideration or considerations as may be fixed from time to time by the Board of Directors.

In Witness Whereof, we have hereunto severally subscribed our names as of this 15th day of April, 1940.

/s/ A. D. McDONALD,

President and Director.

/s/ WM. DeFOREST MANICE,

Director.

/s/ JACKSON E. REYNOLDS,

Director.

/s/ CLEVELAND E. DODGE,

Director.

/s/ LAWRENCE COOLIDGE,

Director.

/s/ WALTER DOUGLAS,

Director.

[43]

/s/ CHARLES E. PERKINS,

Director.

/s/ HENRY L. CORBETT,

Director.

/s/ V. H. ROSSETTI,

Director.

/s/ J. B. BLACK,

Director.

/s/ ALLEN L. CHICKERING,

Director.

/s/ STUART L. RAWLINGS,

Director.

/s/ HARVEY S. MUDD,

Director.

/s/ BEN C. DEY,

Director."

8. The aforesaid amendment was duly filed and recorded in the office of the Secretary of State for the Commonwealth of Kentucky on April 22, 1940, and was in force and effect at the time of the assessment and payment of the stamp tax which is the subject of this action and of plaintiff's complaint.

9. Said meeting of the stockholders of the Old Company, at which said amendment was authorized, was called by a resolution duly adopted at a regular meeting of the Board of Directors of the Old Company, duly called and held on January 11, 1940. Said resolution reads as follows:

“The President brought to the attention of the Directors the matter of changing the par value stock of this Company to stock without nominal par value. After a full discussion it was the consensus of opinion that it would be advisable for this Company in aid of meeting its capital requirements and for other corporate purposes, to be prepared, when circumstances permit, to issue its capital stock through the exercise of conversion rights to be granted to holders of its indebtedness, or by other appropriate method, at such times and on such terms as this Board may determine; that it does not seem probable that capital stock may be issued in the near future for a consideration equal to its present par value of \$100 per share and that in order to permit capital stock to be of effective aid in financing under such conditions the capital stock of the Company should be changed from par value stock to stock without nominal par value.

On motion, duly made and seconded, it was, subject to the consent of the stockholders and to authorization by the Interstate Commerce Commission, unanimously

Resolved,

That the authorized capital stock of said Company, consisting of 5,944,518 common shares of the par value of \$594,451,800, of which 3,772,763.0564 shares are issued and outstanding, and 2,171,754.9436 shares are unissued, be changed into the same number of common shares without nominal par value;

That 3,772,763.0564 shares of said shares without nominal par value be substituted, share for share, [44] for the said presently issued and outstanding shares of the par value of one hundred dollars (\$100) each;

That the unissued 2,171,754.9436 shares of said authorized shares without nominal par value may be issued by the Company from time to time in such amounts, upon such terms, for such corporate purposes, and for such consideration or considerations as may be fixed from time to time by the Board of Directors.

That upon the approval of the stockholders being duly obtained, amendment to the Charter or Articles of Incorporation changing the capital stock of Southern Pacific Company be executed by the President and by the Directors of this Company, or the majority thereof, and attested and filed as required by law, and that the stockholders be requested to take any other and further action

necessary or appropriate to authorize the directors and officers of the Company to carry out the said amendment of the Charter or Articles of Incorporation changing the capital stock of this Company.

Resolved Further, That the Secretary of the Company be directed to request the stockholders of this Company to give their written consent to the proposed amendment to the Charter or Articles of Incorporation changing the capital stock of this Company, which consent may, in his discretion, be embodied in the form of proxies to be sent to the stockholders in connection with the annual meeting of this Company to be held April 3, 1940, and the Secretary of the Company, in giving the usual notice of the annual meeting of stockholders, it hereby directed to give appropriate notice that there will be submitted for vote by the stockholders at the said annual meeting resolutions approving the foregoing amendment of the Charter or Articles of Incorporation changing the capital stock of the Southern Pacific Company, and the annual meeting shall be held for the purpose, among others, of voting upon the said amendment and the said change in capital stock and authorizing action incidental thereto; that with the notice and form of proxy there should be sent to the stockholders appropriate proxy statement as required by the rules of the Securities and Exchange Commission, and also letter from the President of this Company stating the reasons for the recommendation of the Directors in this respect; said notice, proxy, proxy statement, and letter to be substantially in form

as submitted at this meeting, with such variations as may be approved by the President.

Resolved Further, That this Company make application to the Interstate Commerce Commission for authority to cause to be issued in exchange for its par value common stock now outstanding 3,772,763.0564 shares of this Company's common capital stock without nominal par value, and that A. D. McDonald, President, and John G. Walsh, Vice President, and F. Van Note, Vice President, of this Company are hereby severally designated as an executive officer to make, verify and file said application and to take such other action in connection therewith as he may deem requisite or expedient.

Resolved Further, That the proper officers be and [45] they are hereby authorized to take all steps necessary or proper to secure the listing of the said stock without nominal par value on the New York Stock Exchange and other stock exchanges and registration with the Securities and Exchange Commission; that John G. Walsh, Vice President, F. Van Note, Vice President and Controller, or George L. Buland, Assistant General Counsel, be and he hereby is authorized to make application for the listing of the said stock upon the Stock Exchanges and is designated to appear before the Committee on Stock List of said Exchanges with authority to make such changes in such applications or in any agreements relative thereto as may be necessary to conform with the requirements for listing."

10. By report and order of the Interstate Commerce Commission, dated March 26, 1940, in Finance Docket No. 12801, 239 I.C.C. 293, copy of which is attached, the Interstate Commerce Commission authorized the Old Company to issue not to exceed 3,772,763.0564 shares of common capital stock without nominal or par value, said stock to be exchanged on a share-for-share basis for an equal number of shares of outstanding common stock of a par value of \$100 a share.

11. At said annual meeting of the stockholders of the Old Company, duly called and held at Spring Station, Kentucky, on April 3, 1940, the stockholders of the Old Company adopted the following resolution:

“The Chairman stated to the stockholders that among the matters to be presented to the stockholders at this meeting, as stated in the notice of such meeting, was the proposal for the amendment of the Charter or Articles of Incorporation changing the capital stock of the Southern Pacific Company so as to provide for stock without nominal par value in lieu of stock with a nominal par value of \$100 per share, and that the taking of such action had been recommended to the stockholders by the Board of Directors by resolution dated January 11, 1940.

Thereupon the following resolutions were duly proposed and seconded, and a stock vote thereon by ballot was requested and ordered.

Resolved, That the stockholders of the Southern Pacific Company do hereby authorize and consent

That the authorized capital stock of said Company, consisting of 5,944,518 common shares of the par value of \$594,451,800, of which 3,772,763.0564 shares are issued and outstanding, and 2,171,754.9436 [46] shares are unissued, be changed into the same number of common shares without nominal par value;

That 3,772,763.0564 shares of said shares without nominal par value be substituted, share for share, for the said presently issued and outstanding shares of the par value of one hundred dollars (\$100) each;

That the unissued 2,171,754.9436 shares of said authorized shares without nominal par value may be issued by the Company from time to time in such amounts, upon such terms, for such proper corporate purposes, and for such consideration or considerations as may be fixed from time to time by the Board of Directors.

That the foregoing changes and provisions be and the same are hereby adopted as an amendment of the Charter or the Articles of Incorporation of the Southern Pacific Company, and that the President and a majority of the Board of Directors of this Company be and they are hereby authorized to sign and cause to be filed and recorded as required by law in the State of Kentucky an amendment of the said Charter or Articles of Incorporation embodying the foregoing changes and provisions, and the proper officers of the Company are authorized to take or cause to be taken all such action as may be necessary or required by

law to make effective the said amendment changing the capital stock of this Company.

That the Board of Directors and proper officers of this Company are hereby authorized and empowered to take any and all action necessary or **appropriate to carry out** the effect and intent of said amendment and the issuance or substitution of stock as therein authorized, and the said Board of Directors are authorized and empowered to provide in the contracting of any indebtedness for the conversion thereof into the stock of this Company in such amounts, upon such terms, and for such consideration or considerations as the said Board of Directors may fix and determine from time to time."

12. Pursuant to the aforesaid amendment of its Charter, the Old Company issued in exchange for its then outstanding par value stock an identical number of shares of no par value stock. The Old Company's stockholders paid no money, nor any consideration, to the Old Company for new no par value stock, except that they surrendered said old par value stock, and received in exchange for said old stock nothing but the new stock.

13. Prior to the aforesaid exchange, the Old Company's stock account as shown in its balance sheet for March 31, 1940, was set forth as follows:

"Stock

751. Capital Stock	\$377,276,305.64
753. Premium on Capital Stock	6,304,845.00
<hr/>	
Total Stock	\$383,581,150.64"

The Old Company's stock account prior to the aforesaid exchange was also shown in identical form in its annual report to the Interstate Commerce Commission, except that the figures in cents were not shown; the pertinent page of such report for the year 1940 entitled "Balance at Beginning of Year" carrying this account as follows:

"Stock

751. Capital Stock	\$377,276,306
753. Premium on Capital Stock	6,304,845
	<hr/>
Total Stock	\$383,581,151

14. The Subaccount 751, entitled "Capital Stock", represented the total par value of the Old Company's capital stock. The Subaccount 753, entitled "Premium on Capital Stock", represented the excess over par received by the Old Company upon the issuance of 210,157 shares of its capital stock in the following circumstances:

In 1909 certain bonds were issued by the Old Company which gave the holders thereof the privilege of converting their bonds into paid-up shares of common stock of the Old Company at the rate of \$130 par value of bonds for each \$100 par value of stock, on or before June 1, 1919. Up to January 9, 1912, \$662,090 par value of said bonds were surrendered, and the Company issued in place thereof 5,093 shares of its \$100 par value capital stock. The par value of the stock was entered in the "Capital Stock" Subaccount, and the excess of the par value of the bonds over the par value of the stock, namely, \$152,790, was entered in the

“Premium on Capital Stock” Subaccount. There was no law taxing the original issue of certificates of stock [48] when this conversion was made, so that no tax was payable on the original issue of these 5,093 shares.

In 1919 bonds of a par value of \$26,657,150 were turned in and the Old Company issued in place thereof 205,055 shares of its capital stock, each share having a par value of \$100. The par value of the stock was entered in the “Capital Stock” Subaccount, and the excess of the par value of the bonds over the par value of the stock, namely, \$6,151,650, was credited to the “Premium on Capital Stock” Subaccount. In accordance with the law, revenue stamps at the rate of five cents (5 cents) on each \$100 of par value of the 205,055 shares of \$100 par value stock were purchased by the Old Company and actually attached to the stock books.

In 1929 the Old Company issued certain bonds which had warrants attached thereto, entitling the owners thereof to purchase on or before May 1, 1934, 3 shares of the Company’s \$100 par value of stock at \$145 per share, plus adjustment of accrued dividends. A total of 9 shares of the Old Company’s stock was purchased pursuant to this arrangement in 1930 for a total price of \$1,305. The par value of the stock was entered in the “Capital Stock” Subaccount, and the excess of \$405 over par was credited to the “Premium on Capital Stock” Subaccount. The correct amount of Federal revenue stamps applicable to the original issue of these 9 shares was affixed to the stock

books of the Old Company at the time these 9 shares were issued.

15. After the exchange of no par value stock for par value stock, the accounts of the Old Company were identical with what they had been immediately prior thereto, except that the amounts in the two subaccounts of the stock account were merged and the total of the two, \$383,581,150.64, was placed in "Capital Stock" Subaccount 751. Subsequent to the exchange, [49] the Old Company's stock account, as shown in its balance sheet for April 30, 1940, was carried as follows:

"Stock

751. Capital Stock	\$383,581,150.64
753. Premium on Capital Stock
	<hr/>
Total Stock	\$383,581,150.64"

The Old Company's stock account, subsequent to the above exchange, was also shown in identical form in its annual report to the Interstate Commerce Commission for 1940, except that the figures in cents were not shown; the pertinent page of such report for the year 1940, entitled "Balance at Close of Year", carrying this account as follows:

"Stock

751. Capital Stock	\$383,581,151
753. Premium on Capital Stock
	<hr/>
Total Stock	\$383,581,151"

There was no change in the Old Company's surplus account, no change in the number of its shares outstanding, and no change in its "Total Stock"

Account. There was a transfer of the amounts of \$152,790, \$6,151,650 and \$405, aggregating the "Premium on Capital Stock" total of \$6,304,845, which are set forth in the second, third and fourth sub-paragraphs of paragraph "14" of this stipulation and were added to the "Capital Stock" account of \$377,276,305.64, making the total of \$383,581,150.64 set forth in this numbered paragraph "15". No original issue tax was ever paid in respect to the amount of \$6,304,845 transferred from "Premium on Capital Stock" account to the "Capital Stock" account other than as set forth in paragraph "17" of this stipulation and which the plaintiff seeks to recover in this action.

16. The Commissioner of Internal Revenue, by letter dated [50] July 15, 1942, addressed to Internal Revenue Agent R. C. Cannedy at Los Angeles, California, ruled that, as the result of the change of the Old Company's stock from \$100 par value shares to no par value shares, the original issue stamp tax became due under Section 1802(a) of the Internal Revenue Code. It was held by the Commissioner that, by reason of the transfer of the \$6,304,845 from Subaccount 753, "Premium on Capital Stock", to Subaccount 751, "Capital Stock", additional capital in that amount was dedicated to the capital account; that this amount represented capital with respect to which no previous issue tax had ever been paid; and that the tax was due with respect to the full amount of \$383,581,150.64 in the Old Company's "Capital Stock" Subaccount 751 because "the new capital and the

old capital were intermingled in such a way that it cannot be said that the increase in the Capital Stock Account can be allocated to specific shares." Demand was made upon the Old Company for payment of the issue tax with respect to the entire amount in "Capital Stock" Subaccount 751 following the change to no par shares.

17. On or about February 26, 1943, the Old Company paid, under protest, to the defendant, Harold A. Berliner, who was then the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, the sum of \$46,687.95 in payment of said Federal stamp tax above stated.

18. Thereafter, on or about June 11, 1943, and within the applicable period of limitations, the Old Company served upon and filed with the Commissioner of Internal Revenue of the United States, by filing the same with the then Collector of Internal Revenue for the First District of California, the District where said tax was paid, pursuant to law and to the rules and regulations duly adopted and promulgated by said Commissioner [51] of Internal Revenue, its written and verified claim for refund and repayment of said amount of \$46,687.95, together with its written statement in support of said claim. Copies of said claim and of said supporting statement are attached to the complaint filed herein.

19. On March 9, 1944, said Commissioner of Internal Revenue of the United States rejected

said claim of the Old Company for refund and repayment of said amount paid by the Old Company on account of said stamp tax.

20. No part of said stamp tax paid by the Old Company has ever been refunded or credited to it or to plaintiff.

21. Plaintiff is legally entitled to receive refund of any such stamp taxes so paid by the Old Company that are properly refundable, together with interest at the rate provided by applicable law on such amount.

Dated this 20th day of November, 1947.

GEORGE L. BULAND,
FRANK J. GALLAGHER,
Attorneys for Plaintiff.

FRANK J. HENNESSY,
United States Attorney.

By WILLIAM E. LICKING,
Assistant U. S. Attorney,
Attorney for Defendant. [52]

Interstate Commerce Commission
Finance Docket No. 12801

SOUTHERN PACIFIC COMPANY STOCK

Submitted March 25, 1940.

Decided March 26, 1940.

Authority granted to issue not exceeding 3,772,-763.0564 shares of common capital stock without nominal or par value in exchange, on a share for share basis, for an equal number of shares of out-

standing common stock with a par value of \$100 a share.

Ben C. Dey, George L. Buland, and Charles L. Minor for applicant.

REPORT OF THE COMMISSION

Division 4, Commissioners Porter, Mahaffie, and Miller.

By Division 4:

The Southern Pacific Company, on March 7, 1940, applied for authority to issue 3,772,763.0564 shares of common capital stock without nominal or par value. No objection to the application has been offered.

The applicant was incorporated under the laws of the State of Kentucky and has an authorized capital stock of \$594,451,800. Of this amount, \$377,276,305.64 is outstanding, being 3,772,763.0564 shares of common stock with a par value of \$100 a share.

The applicant proposes to amend its articles of incorporation to change its authorized capital stock from shares with a par value of \$100 a share to shares without nominal or par value, the number of authorized shares to remain unchanged. Of the total authorized shares, 3,722,763.0564 will be issued to the holders of the outstanding stock, upon the surrender of the outstanding certificates, on a share for share basis and will be entered in the applicant's capital stock account at \$383,581,150.64, [53] representing the par value and premium on its

outstanding stock. The remainder of the stock, 2,171,-754.9436 shares, is to remain unissued.

The board of directors, on January 11, 1940, approved and authorized the proposed amendment to the applicant's articles of incorporation, subject to the authorization and approval of the stockholders. The authority herein requested is to enable the applicant to exchange its stock on the basis indicated.

Pending the engraving of new stock certificates, the applicant will issue certificates of its existing common stock stamped to indicate the change from stock with a par value of \$100 a share to stock without nominal or par value.

Under the laws of the State of the applicant's incorporation its stock cannot be issued for a consideration less than par value, and under present conditions it is improbable that the stock can be disposed of in the near future for a consideration equal to its par value. The change from stock with par value to stock without nominal or par value is essential if stock is to be issued in financing when opportunity therefor arises.

The annual meeting of the applicant's stockholders will be held on April 3, 1940, at which meeting the proposed amendment to the applicant's articles of incorporation will be presented for approval and authorization. As all requisite action has not yet been taken to authorize and approve the matters and things herein involved, our order will require that the applicant shall file in this proceeding, before issuing any of the stock without nominal or

par value, a certified copy of the resolution adopted by the stockholders authorizing and approving [54] the amendment to the applicant's articles of incorporation, together with a duly attested copy of the amendment to its articles of incorporation providing for the change in the capital stock heretofore mentioned.

We find that the proposed issue by the Southern Pacific Company of not exceeding 3,772,763.9564 shares of common capital stock without nominal or par value, as aforesaid, (a) is for a lawful object within its corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

An appropriate order will be entered. [55]

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 26th day of March, A. D. 1940.

Finance Docket No. 12801

Southern Pacific Company Stock

Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the Southern Pacific Company be, and it is hereby, authorized to issue not exceeding 3,772,763.0564 shares of common capital stock without nominal or par value; said stock to be exchanged, on a share for share basis, for an equal number of shares of outstanding common stock of a par value of \$100 a share.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission.

It is further ordered, That, before issuing any of the stock herein authorized, the applicant shall file in this proceeding a certified copy of the resolution of the stockholders authorizing and approving the amendment to its articles of incorporation and a duly attested copy of said amendment.

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by Division 4, dated February 19, 1927, respecting applications filed under section 20-a of the Interstate Commerce Act. [56]

And it is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

By the Commission, Division 4.

(Seal)

W. P. BARTEL,
Secretary.

[Endorsed]: Filed Nov. 20, 1947.

[57]

[Title of District Court and Cause.]

Action to recover alleged overpayment of documentary stamp tax. Judgment for defendant.

George L. Buland and Frank J. Gallagher, San Francisco, California, attorneys for plaintiff.

Frank J. Hennessy, United States Attorney, and William E. Licking, United States Attorney (Thereon Lamar Caudle, Assistant Attorney General, and Andrew D. Sharpe and F. A. Michels, Special Assistants to the Attorney General, on the brief) of San Francisco, California, attorneys for defendant. [58]

MEMORANDUM OPINION

Roche, District Judge: Plaintiff seeks to recover the sum of \$46,687.95 with interest, on account of an alleged overpayment of documentary stamp taxes. The tax was levied on shares of no-par value stock issued in exchange for par value stock and the question for decision is whether, under the circumstances of this case, such issue constituted an "original issue" within the meaning of Sections 1800 and 1802 of the Internal Revenue Code.¹

¹ Sec. 1800. Imposition of Tax.

There shall be levied, collected, and paid, for and in respect to the several bonds, debentures, or certificates of stock * * * and things mentioned and described in sections 1801 to 1807, inclusive, * * * (26 U.S.C. 1940 ed., Sec. 1800.)

Sec. 1802 (as amended by Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 1). Capital Stock (and Similiar Interests.)

(a) Original Issue.—On each original issue, whether on organization or reorganization, of shares

The facts were stipulated and are substantially as follows:

During the tax period involved the plaintiff existed as a Kentucky corporation engaged in business in interstate commerce as a common carrier by rail. Prior to April, 1940, plaintiff's capital

or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents until July 1, 1941, and 5 cents thereafter: Provided, That where such shares or certificates are issued without par or face value, the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, per share (corporate share, or investment trust or other organization share, as the case may be), unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, on each \$100 of actual value or fraction thereof of such certification (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents until July 1, 1941, and 1 cent thereafter, on each \$20 of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued. (26 U.S.C. 1940 ed., Section. 1802.)

stock consisted of 5,944,518 common shares, each having a par value of \$100. Of these, 3,772,763.0564 shares were issued and outstanding and 2,171,754.9436 shares were unissued. Any stamp tax due on the issued shares had been paid. In April, 1940, the articles of incorporation were amended to provide for changing the capital stock from par value to no-par value shares and an even exchange was effected with the par value shareholders. This change in the type of stock did not affect the proportionate interest of the shareholders in the corporation's assets, and had the capital stock account remained unchanged, the new issue would have been free from any stamp tax. *American Laundry Machinery Co. v. Dean*, 292 Fed. 620.

However, prior to the exchange the stock account, which was kept according to the Interstate Commerce Commission regulations, showed capital stock in the sum of \$377,276,305.64 (the total par value of the issued stock) and premium on capital stock in the sum of \$6,304,845.00. This premium resulted from the sale to bondholders of nine shares of stock at \$145 a share and the conversion of bonds into paid-up shares of common stock at the rate of \$130 par value of bonds for each \$100 par value of stock. The premium thus represented the amount received in excess of the stock par value.

After the exchange of no-par value stock for the par value stock, the amounts previously listed separately in the stock account as "Capital Stock" and "Premium on Capital Stock" were merged and

the total of the two, \$383,581,150.64 was placed in the "Capital Stock" subaccount.

The Commissioner of Internal Revenue determined that the transfer of the amount previously listed as "Premium on [60] Capital Stock" to the "Capital Stock" subaccount resulted in additional capital being dedicated to the capital stock account; that this represented capital upon which no previous issue tax had ever been paid; that the new capital and old capital were so intermingled that it was impossible to allocate to the new capital any of the no-par value shares, and that as a result the entire new issue of no-par value stock was subject to the stamp tax. The tax was paid under protest and claim for refund was denied.

Plaintiff, which now exists as a Delaware corporation, contends that the issue of no-par value stock did not result in the dedication of additional capital so as to make the issue an "original issue" within the meaning of the statute, and alternatively, that even if the original issue tax be deemed applicable, it should be limited to that portion of the total issue representing the \$6,304,845 "Premium on Capital Stock" which was transferred to the "Capital Stock" subaccount.

Plaintiff's position rests on the proposition that the premium on capital stock was always a part of the capital stock account and was set up separately, prior to the exchange of stock, only because Interstate Commerce Commission regulations so required; that the regulations likewise required its merger with the capital stock account, after the

exchange of no-par value for par value stock, but that this was merely accounting procedure. In effect, plaintiff argues that it is now being penalized by one Government department for doing what another department required.

The courts have interpreted the term "original issue", as used in Section 1802, *supra*, to be applicable to a new issue where the capital stock account has been increased either by receipt of additional consideration for the new stock or by the transfer of a given amount from paid-in surplus or earned surplus. If definite shares of the new issue can be identified as having been issued against the increase in capital, the tax is levied only on such shares. If there is such an intermingling of old and new capital that such identification is impossible, the entire [61] new issue is taxable. This is true because the tax is not on the capital behind the shares of stock but is measured by the par value of the shares (or actual value if not par value shares) represented by each stock certificate. *W. T. Grant C. v. Duggan*, 94 F. 2d 859, *Rio Grande Oil Co. v. Welch*, 101 F. 2d 454, *United States v. Pure Oil Co.*, 135 F. 2d 578.

When the corporation had only par value stock its capital stock account represented the sum total of \$100 par value for each share of stock issued. The premium on capital stock represented paid-in surplus and, under Kentucky corporation law, could have been distributed as dividends, a disposition that could not have been made of any part of the

capital stock account. With the exchange of the par value stock for an equal number of no-par value shares and the transfer of the amount in the premium account to the capital stock account, the total amount of capital behind the shares was increased. The fact that the transfer may have been required by Interstate Commerce Commission regulations does not change the realities of the situation. While the \$6,304,845 remained in the premium account no shares of stock were issued against it and therefore, no original issue tax was ever paid with respect to that amount. When it became part of the capital stock account against which the new shares were issued without any allocation of specific shares to such transferred sum, each share represented both old and new capital and was thus taxable as an original issue under the statute. *American Gas & Electric Co. v. United States*, 69 F. Supp. 614.

In accordance with the foregoing it is, therefore,

Ordered that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the defendant and against the plaintiff and that defendant recover his costs in this behalf expended.

Dated July 16th, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 16, 1948.

[62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on for trial on November 20, 1947, and was on that day submitted upon a stipulation of the facts. Upon such submission the Court took the matter under advisement and directed the filing of written briefs by the parties. The briefs having been filed and the Court, having considered the facts and the briefs and now being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff is a Delaware corporation. Prior to September 30, 1947, the plaintiff existed as a Kentucky corporation, engaged in business in interstate commerce as a common carrier by rail.

2. The defendant was Collector of Internal Revenue for the First Collection District of California from January 1, 1943, to March 31, 1945.

3. Prior to April 1940, plaintiff's capital stock consisted of 5,944,518 common shares of a par value of \$100 each. Of those shares, 3,772,763.0564 shares of the total par value of \$377,276,305.64 had been issued and were outstanding.

4. In April 1940 the plaintiff issued and exchanged with its stockholders 3,772,763.0564 shares of no par value stock for the [63] 3,772,763.0564 shares of the \$100 par value stock.

5. At the time of and in connection with the exchange of the stock the plaintiff added the

amount of \$6,304,845 to the capital stock account and thereby increased it to \$383,581,150.64.

6. The amount of \$6,304,845 was additional capital and no original issue tax was ever paid with respect to that amount.

7. When the amount of \$6,304,845 was transferred to the capital stock account and the new shares were issued, there was no allocation of specific shares to such transferred amount, each share represented both old and new capital and the new capital was so intermingled with the old capital that it is impossible to identify any part thereof with any of the new shares.

8. The Commissioner of Internal Revenue determined that all of the 3,772,763.0564 shares of no par value stock were taxable as an original issue and the amount of such tax was \$46,687.95.

9. The plaintiff paid the amount of \$46,687.95 to the defendant on February 26, 1943. A claim for the refund of the amount was filed June 11, 1943 and was wholly rejected by the Commissioner of Internal Revenue on March 9, 1944.

CONCLUSIONS OF LAW

1. That an original issue tax in the amount of \$46,687.95 was incurred under the provisions of Section 1802 of the Internal Revenue Code as amended upon the issuance of the 3,772,763.0564 shares of no par value stock in exchange for the like number of outstanding shares of the \$100 par value stock because of the addition of the amount of \$6,304,845 to the capital stock account without

any allocation of specific shares to such transferred amount.

2. When the \$6,304,845 became part of the capital stock account against which the new shares were issued without any allocation of specific shares to such transferred sum, each share represented both old and new capital and was thus taxable as an original issue under the statute.

3. That the plaintiff is not entitled to recover in this action.

4. That the defendant recover judgment for his costs.

Dated this 29th day of October, 1948.

MICHAEL J. ROCHE,
Judge.

[Endorsed]: Filed Oct. 29, 1948.

[64]

In the United States District Court for the
Northern District of California, Southern Division.

Civil Action No. 25664-R

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff,

vs.

HAROLD A. BERLINER, Former Collector of
Internal Revenue for the First Collection Dis-
trict of California,

Defendant.

JUDGMENT AND DECREE

The above case came on regularly for trial on November 20, 1947. The parties thereto were represented by counsel as follows: William E. Licking, Esq., Assistant United States Attorney, for the defendant Harold A. Berliner; George L. Buland, Esq., and Frank J. Gallagher, Esq., Attorneys for plaintiff Southern Pacific Company. A stipulation of facts was filed with the Court and the case ordered submitted upon briefs upon said stipulation of facts and briefs thereafter to be filed. Said briefs having been filed and considered by the Court, and the Court having heretofore filed a memorandum opinion herein and having filed its findings of facts and conclusions of law herein, Now, Therefore, from said findings of fact and conclusions of law, It Is Hereby Ordered, [65] Adjudged and Decreed that plaintiff take nothing by this action and that defendant have and recover

judgment for its costs of suit herein incurred in the amount of \$10.00.

Dated this 29th day of October, 1948.

MICHAEL J. ROCHE,

Judge of the United States District Court.

Approved as to form as provided by Rule 5(d):

F. J. GALLAGHER,

Attorney for Plaintiff.

Entered in Civil Docket Nov. 1st, 1948.

[Endorsed]: Filed Oct. 29, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Southern Pacific Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this case on November 1, 1948.

Dated November 26, 1948.

GEORGE L. BULAND,

FRANK J. GALLAGHER.

[Endorsed]: Filed Nov. 26, 1948.

[66]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
PLAINTIFF (AS APPELLANT) INTENDS
TO RELY ON APPEAL

Pursuant to Rule 75(d) of the Rules of Civil Procedure for United States District Courts, plaintiff hereby states that, upon its appeal from the judgment heretofore entered on November 1, 1948, in the above-entitled cause, said plaintiff, as appellant, intends to rely upon the following points:

1. The error of the above-named Court in finding that the amount of \$6,304,845, transferred by plaintiff's predecessor from its Premium on Capital Stock Account to its Capital Stock Account at the time of the exchange of 3,772,763.0564 shares of its no-par value stock for the like number of outstanding shares of its \$100 par value stock, was additional capital and that no original [67] issue tax was ever paid with respect to that amount.

2. The error of said Court in failing to find that the said amount of \$6,304,845 was not additional capital.

3. The error of said Court in finding and concluding that an original issue tax was incurred under the provisions of Section 1802 of the Internal Revenue Code, as amended, upon the issuance of said 3,772,763.0564 shares of no-par value stock in exchange for the like number of outstanding shares of \$100 par value stock.

4. The error of said Court in finding and concluding that when the \$6,304,845 was transferred

from the Premium on Capital Stock Account to the Capital Stock Account each of the new shares issued represented both old and new capital and was thus taxable as an original issue under the statute.

5. The error of said Court in failing to find and conclude that the exchange of no-par value stock for par value stock was effected without the capital of the corporation being increased either by transfer of surplus to Capital Account or otherwise.

6. The error of said Court in failing to find and conclude that the issue of the 3,772,763.0564 shares of no-par value stock was not an original issue within the meaning of Sections 1800 and 1802 of the Internal Revenue Code and the applicable regulation.

7. The error of said Court in finding and concluding that plaintiff is not entitled to recover in this action and that defendant is entitled to recover judgment for his costs.

8. The error of said Court in failing to find and conclude that plaintiff is entitled to recover in this action the sum of \$46,687.95, together with interest on said sum from February 26, 1943, as provided by law.

9. The error of said Court in rendering and entering judgment in this action in favor of defendant and against plaintiff [68] and directing that defendant have and recover his costs of suit herein.

10. The error of said Court in not rendering and entering judgment for plaintiff and against defendant in the sum of \$46,687.95, together with interest

on said sum from February 26, 1943, as provided by law.

Wherefore, said plaintiff and appellant prays that said judgment may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated November 30, 1948.

GEORGE L. BULAND,
FRANK J. GALLAGHER,
Attorneys for Plaintiff and
Appellant.

(Receipt of Service.)

[Endorsed]: Filed Dec. 1, 1948.

[69]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above Court:

Pursuant to Rule 75(a) of the Rules of Civil Procedure for United States District Courts, Southern Pacific Company, a corporation, the above-named plaintiff, hereby designates the following to be contained in the record on appeal for the purposes of appeal by said plaintiff from the judgment entered herein on November 1, 1948; and you are hereby requested to make a transcript of such record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to notice of appeal heretofore filed on November

26, 1948, and to forward the same as soon as practicable to the Clerk of said Court of Appeals:

1. Complaint filed February 9, 1946. [70]
2. Answer filed July 30, 1947.
3. Petition of Southern Pacific Company, a Delaware corporation, to be substituted as plaintiff in place of Southern Pacific Company, a Kentucky corporation (excluding Exhibit A and B thereto).
4. Order of Substitution.
5. Stipulation of Facts.
6. "Memorandum Opinion" of the District Court.
7. District Court's Findings of Fact and Conclusions of Law.
8. Notice of Appeal.
9. Statement of Points upon which Plaintiff (as Appellant) intends to Rely on Appeal.
10. Clerk's Certificate to the transcript of record.
11. This designation.

Dated November 30, 1948.

GEORGE L. BULAND,
FRANK J. GALLAGHER,
Attorneys for Plaintiff and
Appellant.

(Receipt of Service.)

[Endorsed]: Filed Dec. 1, 1948.

[71]

In the District Court of the United States,
Northern District of California.

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 71 pages, numbered 1 to 71, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Southern Pacific Company, a corporation, vs. Harold A. Berliner, Former Collector of Internal Revenue, etc., No. 25664-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seven Dollars and Seventy Cents (\$7.70) and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 8th day of December, A. D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12117. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Harold A. Berliner, Former Collector of Internal Revenue

for the First Collection District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

Civil Action No. 12117

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

HAROLD A. BERLINER, Former Collector of
Internal Revenue for the First Collection District of California,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF THE REC-
ORD TO BE PRINTED

In accordance with Rule 19(6) of the Rules of the Court, appellant adopts, as its statement of points upon which it intends to rely upon the appeal in this cause, the "Statement of Points upon which Plaintiff (as Appellant) Intends to Rely

on Appeal", filed in the District Court and found on pages 67 to 69, inclusive, of the original certified record herein, and designates for printing the entire transcript.

/s/ GEORGE L. BULAND,

/s/ FRANK J. GALLAGHER,

Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 14, 1948. Paul P. O'Brien, Clerk.

No. 12,117

IN THE
United States
Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

HAROLD BERLINER, Former Collector of
Internal Revenue for the First Collec-
tion District of California,

Appellee.

BRIEF FOR APPELLANT

FILED

FEB 17 1949

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Subject Index

	Page
Statement as to Jurisdiction.....	1
Statement of the Case.....	3
Specification of Errors Relied On.....	9
Summary of Argument.....	11
Argument	11
I. An Issue of Shares of No-Par Value Stock in Exchange for Shares with a Par Value Is Not Taxable as an Original Issue	11
II. There Was No Increase in the Capital of the Old Company, and the Subject Issue Is Specifically Exempt by the Applicable Regulation.....	20
III. The Commissioner of Internal Revenue May Not Resort to the Rules of the Interstate Commerce Commission Adopted for Other Purposes for the Purpose of Levying Taxes Under the Internal Revenue Code...	35
Conclusion	40
Appendix	App. 1

Table of Authorities Cited

CASES	Pages
American Gas & Electric Co. v. United States (D.C., S.D. N.Y.), 69 F. Supp. 614.....	16, 19, 35
Bailey Co. v. Routzahn, D.C., Ohio E.D., dec. Jan. 16, 1925, 1 U.S.T.C., par. 112.....	12
Binzel v. Commissioner (C.C.A. 2), 75 F.(2d) 989, cert. den. 296 U.S. 579	16
Caha v. United States, 152 U.S. 211.....	4
Callaway, as Trustee, etc. v. Benton, Sup. Ct. of U.S., No. 21, Oct. Term 1948, dec. Feb. 7, 1949.....	37
Cleveland Provision Co. v. Weiss (D.C., N.D. Ohio), 4 F.(2d) 408	12, 13, 14, 36
Commissioner v. Wakefield (C.C.A. 6), 139 F.(2d) 280.....	16
Cuba Railroad Co. v. United States, 60 Ct. Cl. 272.....	12
Edwards v. Wabash Ry. Co. (C.C.A. 2), 264 Fed. 610.....	12, 14, 15, 16, 18, 19, 36, 39
Gould v. Gould, 245 U.S. 151.....	39
Grant-Lees Gear Co., In re (D.C., N.D. Ohio), 1 F.(2d) 393	12
Haggard v. Lexington Utilities Co., 260 Ky. 261, 84 S.W.(2d) 84	24
Himmel Bros. Co. v. Serriek Corp. (C.C.A. 7), 122 F.(2d) 740	8
Hood River Co. v. Commonwealth, 131 N.E. 201.....	24
Ingram v. Commonwealth, 176 Ky. 706, 197 S.W. 411.....	22
Jarvis, 43 B.T.A. 439.....	29, 30
Lilly v. Grand Trunk Railroad Co., 317 U.S. 481.....	4, 36
McFeely v. Commissioner, 296 U.S. 102.....	39

	Pages
Ohio State Life Ins. Co. v. Busey (D.C., S.D. Ohio), 56 F. Supp. 410	16
Old Colony Rd. Co. v. Commissioner, 284 U.S. 552.....	36, 38
Oppenheimer v. Commonwealth, 305 Ky. 146, 202 S.W.(2d) 373	22
Rio Grande Oil Co. v. Welch (C.C.A. 9), 101 F.(2d) 454	16, 22, 26
Smietanka v. First Trust and Savings Bank, 257 U.S. 602.....	39
United States v. Field, 255 U.S. 257, 18 A.L.R. 1461.....	39
United States v. Woodward, 256 U.S. 632.....	39
West Virginia Pulp & Paper Co. v. Bowers (D.C., S.D. N.Y.), 293 Fed. 144, aff'd 297 Fed. 225, cert. den. 265 U.S. 584	12

STATUTES, ETC.

Internal Revenue Code:	
Sec. 1800	2, 8
Sec. 1802(a)	2, 8
Interstate Commerce Act, Sec. 20 (49 U.S.C.A. 30, 1948 Supp.)	38
Interstate Commerce Commission, Uniform System of Accounts for Steam Railroads.....	36
Kentucky Statutes, Chap. 32:	
Art. I:	
Sec. 548	26, 27
Sec. 553	22, 23
Sec. 559	20, 21
Sec. 564-1	22, 23, 24
Sec. 564-2	20, 21
Art. V:	
Sec. 764	20, 24
Sec. 771	22

Rules of Civil Procedure:

Rule 52	8
Rule 52(a)	8

United States Code, Title 28:

Sec. 41(1)(a) and (b).....	2
Sec. 41(5)	2
Sec. 225(a), First	2

TEXTS

Hatfield, Sanders and Burton, Accounting Principles and Practices (1940 Ed.), pp. 250-264.....	29
Montgomery, Auditing Theory and Practice, 4th Ed.:	
p. 329	29
p. 634	29
Paton's Advanced Accounting (1941 Ed.), pp. 522-523.....	29
Sutherland's Statutory Construction, 3d Ed., Sec. 5204, 59 C.J. 1000-1001	22

TREASURY REGULATIONS AND RULINGS

Bureau Letter dated May 10, 1940, 403 CCH, par. 6281.....	33, 34
Regulations 45, Art. 542.....	30
Regulations 62, 65, 69, Art. 543.....	30
Regulations 71 (1932 Ed.), Art. 29(i).....	27, 28
Regulations 71 (1941 Ed.), Sec. 113.25(f).....	31
Regulations 74, 77, Art. 66.....	30

No. 12,117

IN THE

United States
Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

HAROLD BERLINER, Former Collector of
Internal Revenue for the First Collec-
tion District of California,

Appellee.

BRIEF FOR APPELLANT

STATEMENT AS TO JURISDICTION

This appeal has been taken by appellant (styled "plain-
iff" in the Court below) from a judgment rendered by the
District Court of the United States for the Northern Dis-
trict of California, Southern Division, in an action com-
menced in that Court by Southern Pacific Company, a

Kentucky corporation, (hereinafter referred to as "the Old Company") to recover stamp taxes (Tr. 3). Appellant, a Delaware corporation, is the assignee of the Old Company, having succeeded to all its business and assets under a Plan of Reincorporation involving a mere change in the state of incorporation, and was substituted as plaintiff in this action in place of the Old Company by order of the District Court on October 20, 1947 (Tr. 46-48).

The taxes involved were assessed under Sections 1800 and 1802(a) of the Internal Revenue Code (Tr. 3). Consequently, the District Court had jurisdiction of this action under Section 41(5) of Title 28, United States Code, which gives the District Courts of the United States jurisdiction "of all cases arising under any law providing for internal revenue * * *."

The District Court also had jurisdiction of this action under Section 41(1), subdivisions (a) and (b), of Title 28, United States Code, in that this is a suit of a civil nature, at common law, arising under the Constitution or laws of the United States, in which the matter in controversy, exclusive of interest and costs, exceeds \$3,000 and in which plaintiff (appellant) and defendant (appellee) are residents of different states (Tr. 2, 48).

After trial of the issues raised by the pleadings, the District Court on October 29, 1948, rendered judgment (Tr. 81-82) in favor of defendant (appellee). By notice filed November 26, 1948 (Tr. 82), this appeal was taken from the judgment. The jurisdiction of this Court is invoked under Section 225(a), First, of Title 28, United States Code.

STATEMENT OF THE CASE

This action is brought to recover stamp taxes amounting to \$46,687.95, with interest as provided by law from February 26, 1943, the date of payment. These taxes were paid under protest to appellee (styled "defendant" in the Court below) in his official capacity as Collector of Internal Revenue for the First Collection District of California (Tr. 6) upon an assessment of shares of no-par value stock issued by the Old Company in place and stead of its outstanding par value stock. This action is maintained upon the basis that the assessment was void because the stock taxed was not an original issue but an exchange of stock for an original issue, theretofore issued and outstanding. The appeal is taken upon the judgment roll, and the assignments of error are based on the contention that the facts do not support the conclusions of law.

The facts were stipulated (Tr. 49-71).

The Old Company, on April 23, 1940, had outstanding 3,772,763.0564 shares of capital stock having a par value of \$100 a share, of which 3,562,606.0564 shares were issued at par and 210,157 shares were issued at a premium of \$6,304,845 over par. A substantial part of said stock was issued during periods when federal stamp taxes on the issuance of capital stock were in effect, and on all such parts of its outstanding capital stock the Old Company duly paid the federal stamp taxes then in effect (Tr. 50, Stip. 4). On that date, April 23, 1940, the Old Company, pursuant to an amendment of its charter (Tr. 52-54, Stip. 7), issued in exchange for its then outstanding par value stock an identical number of shares of no-par value stock. The no-par value shares were issued to the holders of the

par value shares and to no others, in exchange for the shares then held (Tr. 50-51, Stip. 5-6). In connection with said amendment and the issuance and exchange of said no-par value stock, no new money was paid in and no property was transferred to the Old Company (Tr. 51, Stip. 5; Tr. 61, Stip. 12). The only change was the transfer of the \$6,304,845 premium on capital stock from one subaccount to another subaccount (Tr. 64-65, Stip. 15).

The Old Company was subject to the accounting regulations of the Interstate Commerce Commission.¹ It was required to comply with the procedure prescribed by the Commission concerning the forms of balance sheets and annual reports. At the time of the above exchange of stock, the Commission's regulations and forms provided for two subaccounts which, when added together, made up the item entitled "Total Stock." These were Subaccounts 751 and 753, respectively entitled "Capital Stock" and "Premium on Capital Stock." Under the Commission's regulations, when a railroad company had outstanding capital stock of a stated par value which had been issued at a premium, it was required to set forth such capital in two subaccounts as follows: (a) the par value in Subaccount 751, entitled "Capital Stock," and (b) the premium in Subaccount 753, entitled "Premium on Capital Stock." The sum of these two made up the item entitled "Total Stock."

The Commission's regulations further required that, when stock having par value was exchanged for stock without par value, sums carried in the premium Subac-

1. These accounting regulations are judicially noticed. *Lilly v. Grand Trunk Railroad Co.*, 317 U.S. 481, 488; *Caha v. United States*, 152 U.S. 211, 221-222.

count 753 for the class of stock retired be cleared to "Capital Stock" Subaccount 751.

Pursuant to these regulations, the stock account of the Old Company prior to the above exchange was set forth as follows in its balance sheets and in its annual reports to the Commission (Tr. 61-62, Stip. 13) (except that in the annual reports figures in cents were not shown):

"STOCK

751	Capital Stock.....	\$377,276,305.64
753	Premium on Capital Stock.....	6,304,845.00
	Total Stock.....	<u>\$383,581,150.64"</u>

After the exchange of no-par value stock for par value stock, the accounts of the Old Company were identical with what they had been immediately prior thereto, except that, pursuant to the requirements of the Interstate Commerce Commission, the amounts in the two subaccounts of the stock account were merged and the total of the two, \$383,581,150.64, was placed in "Capital Stock" Subaccount 751. Subsequent to the exchange, the Old Company's stock account, as shown in its balance sheets and in its annual reports to the Commission, was carried as follows (Tr. 64, Stip. 15) (except that in the annual reports figures in cents were not shown):

"STOCK

751	Capital Stock.....	\$383,581,150.64
753	Premium on Capital Stock.....	—
	Total Stock.....	<u>\$383,581,150.64"</u>

There was no change in the Old Company's surplus account, no change in the number of its shares outstanding, and no change in its "Total Stock" account (Tr.

64-65, Stip. 15). The only change was the transfer to the "Capital Stock" Subaccount 751 of the \$6,304,845 theretofore carried in the premium subaccount and which previously had been realized by the Old Company upon the issuance of tax-paid or tax-free certificates of stock (Tr. 62-65, Stips. 14-15).

The "Premium on Capital Stock" of \$6,304,845 represented the excess over par received by the Old Company upon the issuance of 210,157 shares of its capital stock in the following circumstances (Tr. 62-64, Stip. 14):

In 1909 certain bonds were issued by the Old Company which gave the holders thereof the privilege of converting their bonds into paid-up shares of common stock of the Old Company at the rate of \$130 par value of bonds for each \$100 par value of stock on or before June 1, 1919. Up to January 9, 1912, \$662,090 par value of the said bonds were surrendered and \$509,300 par value of stock was issued in place thereof, i.e., bonds of a par value of \$662,090 were exchanged or paid for 5,093 shares of the capital stock of the Old Company having a par value of \$100 per share. The excess of the par value of the bonds over the par value of the stock, namely, \$152,790, was entered in the Premium on Capital Stock Subaccount. There was no law taxing the original issue of certificates of stock when this conversion was made, so that no tax was payable on the original issue of the 5,093 shares.

In 1919 bonds of a par value of \$26,657,150 were turned in and the Old Company issued in place thereof 205,055 shares of capital stock, each share having a par value of \$100 (total par value, \$20,505,500). The excess of the par value of the bonds over the par value of the stock, namely,

\$6,151,650, was credited to the Premium on Capital Stock Subaccount. The proper amount of stamp tax was paid upon the issuance of the shares of stock issued on the exchange, numbering 205,055 shares.

The remaining \$405 of the \$6,304,845 premium item came about in the following manner: In 1929 the Old Company issued certain bonds which had warrants attached thereto entitling the owners thereof to purchase on or before May 1, 1934, three shares of the Old Company's \$100 par value stock at \$145 per share, plus adjustment of accrued dividends. A total of nine shares of the Old Company's stock was purchased pursuant to this arrangement in 1930 for a total price of \$1,305. The excess of \$405 over par was credited to the Premium on Capital Stock Subaccount. Stamp tax was paid with respect to these shares.

The Commissioner of Internal Revenue determined that the transfer of the amount previously listed as "Premium on Capital Stock" to the Capital Stock Subaccount resulted in additional capital being dedicated to the Capital Account (Tr. 39); that this represented capital upon which no previous issue tax had ever been paid; that the new capital and the old capital were so intermingled that it was impossible to allocate to the new capital any of the no-par value shares, and that, as a result, the entire issue of no-par value stock was subject to the stamp tax as an original issue under Section 1802(a) of the Internal Revenue Code. The tax was paid under protest, and claim for refund was denied (Tr. 35-39).

Following denial of the refund claim, this action was commenced on February 9, 1946. In Memorandum Decision and Opinion dated July 16, 1948 (Tr. 72-77), the

District Court sustained the determination of the Commissioner.

The District Court found as facts (1) that the amount of \$6,304,845 transferred from "Premium on Capital Stock" to "Capital Stock" was additional capital² (Finding No. 6, Tr. 79), and (2) that, when the amount of \$6,304,845 was transferred to the Capital Stock Account and new shares issued, each share represented both old and new capital (Finding No. 7, Tr. 79).

The District Court concluded (1) that, upon the issuance of the 3,772,763.0564 shares of no-par value stock in exchange for the like number of outstanding shares of \$100 par value stock, an original issue tax was incurred under the provisions of Sections 1800 and 1802(a) of the Internal Revenue Code,³ as amended, because of the addi-

2. If this finding had been made upon disputed evidence it would be binding upon appeal, unless clearly erroneous.—Rule 52, Rules of Civil Procedure. This finding, however, is based upon a stipulation of facts, and no such persuasive effect is to be given to it. In truth, this finding is no more than a conclusion of law from the undisputed facts, and findings which are conclusions of law rather than findings of fact are not protected by rule 52(a).—*Himmel Bros. Co. v. Serrick Corp.* (C.C.A. 7), 122 F.(2d) 740, 742.

3. Sec. 1800. Imposition of Tax.

There shall be levied, collected, and paid, for and in respect to the several bonds, debentures, or certificates of stock * * * and things mentioned and described in sections 1801 to 1807, inclusive, * * * (26 U.S.C. 1940 ed., Sec. 1800.)

Sec. 1802 (as amended by Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 1). Capital Stock (and Similar Interests).

(a) Original Issue.—On each original issue, whether on organization or reorganization, of shares or certificates of stock, * * * on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation, * * * 10 cents; provided, that where such shares or certificates are issued without par or face value, the tax shall be 10 cents per share * * *, unless the actual value is in excess of \$100 per share; in which case the tax

tion of the amount of the \$6,304,845 to the Capital Stock Account without any allocation of specific shares to such transferred amount (Concl. No. 1, Tr. 79), and (2) that appellant is not entitled to recover in this action (Concl. of Law No. 2, Tr. 80). On October 29, 1948, judgment was entered against appellant (Tr. 81-82), and this is an appeal from that judgment.

The questions involved are:

(a) Whether, under the facts as stipulated, the District Court should have held, as a matter of law, that the 3,772,763.0564 shares of no-par value stock issued in exchange for the same number of par value shares was not an original issue within the meaning of the applicable statute and regulations; and

(b) Whether, under the facts as stipulated, the District Court should have rendered judgment for appellant.

SPECIFICATION OF ERRORS TO BE RELIED ON

The District Court erred:

1. In finding that the amount of \$6,304,845, transferred by appellant's predecessor from its Premium on Capital Stock Account to its Capital Stock Account at the time of the exchange of 3,772,763.0564 shares of its no-par value stock for the like number of outstanding shares of its \$100 par value stock, was additional capital and that no

shall be 10 cents on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents on each \$20, of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock-books or corresponding records of the organization and not to the certificates issued.

original issue tax was ever paid with respect to that amount (Its Finding No. 6, Tr. 79).

2. In failing to find that the said amount of \$6,304,845 was not additional capital.

3. In finding and concluding that an original issue tax was incurred under the provisions of Section 1802 of the Internal Revenue Code, as amended, upon the issuance of said 3,772,763.0564 shares of no-par value stock in exchange for the like number of outstanding shares of \$100 par value stock (Its Conclusion No. 1, Tr. 79).

4. In finding and concluding that when the \$6,304,845 was transferred from the Premium on Capital Stock Account to the Capital Stock Account each of the new shares issued represented both old and new capital and was thus taxable as an original issue under the statute (Its Conclusion No. 2, Tr. 80).

5. In failing to find and conclude that the exchange of no-par value stock for par value stock was effected without the capital of the corporation being increased either by transfer of surplus to Capital Account or otherwise.

6. In failing to find and conclude that the issue of the 3,772,763.0564 shares of no-par value stock was not an original issue within the meaning of Sections 1800 and 1802 of the Internal Revenue Code and the applicable regulation.

7. In finding and concluding that appellant is not entitled to recover in this action and that appellee is entitled to recover judgment for his costs (Its Conclusion Nos. 3 and 4, Tr. 80).

8. In failing to find and conclude that appellant is entitled to recover in this action the sum of \$46,687.95,

together with interest on said sum from February 26, 1943, as provided by law.

9. In rendering and entering judgment in this action in favor of appellee and against appellant and directing that appellee have and recover his costs of suit herein (Tr. 81-82).

10. In not rendering and entering judgment for appellant and against appellee in the sum of \$46,687.95, together with interest on said sum from February 26, 1943, as provided by law.

SUMMARY OF ARGUMENT

The stamp taxes in question were unlawfully assessed, in that Sections 1800 and 1802(a) of the Internal Revenue Code, upon the basis of which the taxes were levied, require a corporation issuing stock to pay stamp taxes only upon an original issue thereof, and the subject issue was not an original issue within the meaning of the applicable Code provisions and their accompanying regulations. It was merely a reissue of shares to the holders of an original issue in exchange therefor.

ARGUMENT

I.

An Issue of Shares of No-Par Value Stock in Exchange for Shares with a Par Value Is Not Taxable as an Original Issue

It is definitely established as a matter of law that when a corporation issues shares of common stock in exchange for preferred stock, or vice versa, or shares of no-par value stock for shares with a par value, the shares issued in exchange are not taxable as an original issue, whether

or not the new stock carries different or greater rights and privileges than the old.⁴

In *Cleveland Provision Co. v. Weiss* (D.C., N.D. Ohio), 4 F.(2d) 408, four shares of no-par value stock were issued in exchange for each outstanding share having a \$100 par value. It appeared that (p. 409):

“In effecting this reorganization, no other change or readjustment took place with respect to the capital of the corporation. No additional contribution to the capital was made in connection therewith by its stockholders, and no part of the surplus, if any, was transferred to capital account and distributed with or as a part of the reissue. The exchange upon this basis was made. The net result was to leave the corporation assets, its capital and surplus, and its stockholders in precisely the same situation as before, except that each holder of a certificate of common stock of \$100 par value had in lieu thereof at the end of the transaction four shares without nominal or par value.”

The defendant (Government) contended the new certificates constituted original issues of capital stock and were, therefore, taxable. The Court answered this as follows (pp. 409-410):

“The questions of law involved have been considered, and in my opinion settled, at least in principle, in the

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4. *Edwards v. Wabash Ry. Co.* (C.C.A. 2), 264 Fed. 610; *In re Grant-Lees Gear Co.* (D.C., N.D. Ohio), 1 F.(2d) 393; *Cleveland Provision Co. v. Weiss* (D.C., N.D. Ohio), 4 F.(2d) 408; *Cuba Railroad Co. v. United States*, 60 Ct. Cl. 272; *West Virginia Pulp & Paper Co. v. Bowers* (D.C., S.D. N.Y.), 293 Fed. 144, *affd.* 297 Fed. 225, *cert. den.* 265 U.S. 584; *The Bailey Co. v. Routzahn*, D.C. Ohio E.D., decided Jan. 16, 1925, 1 U.S.T.C. par. 112.

following cases: *Edwards v. Wabash Ry. Co.* (2 C.C.A.), 264 F. 610; *Trumbull Steel Co. v. Routzahn* (D.C.), 292 F. 1009; *American Laundry Mach. Co. v. Dean* (D.C.), 292 F. 620; *West Virginia Pulp & Paper Co. v. Bowers* (D.C.), 293 F. 144; *Bowers v. West Virginia Pulp & Paper Co.* (2 C.C.A.), 297 F. 225, writ of certiorari denied, 265 U.S. 584, 44 S. Ct. 459, 68 L.Ed. 1191; *Standard Mfg. Co. v. Remer* (D.C.), 300 F. 252.

* * * * *

Upon the basis of the cases above cited, it is now settled that the statutory provisions in question require a corporation issuing stock to pay these stamp taxes only upon an original issue of stock. Sales, gifts, and transfers of such stock subsequent to the original issue are included, if at all, within other provisions of the act; and by original issue is meant the issue first in point of time, whereby the corporation puts out stock certificates evidencing ownership by its shareholders of its capital. Later exchanges of stock certificates between a corporation and the holders of its outstanding certificates are re-issues, and not original issues; and this is true, even though the exchange consists in converting outstanding common into preferred, or outstanding preferred into common, with different rights and privileges in the capital assets, including changes in the right to vote, in the payment of dividends, and in distribution of assets on final liquidation. In the *Edwards* case this is precisely what was done, and resulted in a large increase both of new outstanding common and of first profit-sharing preferred.

The test is not whether the reissued stock is of a different kind from the original or outstanding issue. It is whether it is an original issue of certificates

evidencing ownership in the corporate capital, or whether it is a reissue of shares to the holders of an original issue in substitution or exchange therefor."

It was contended that stock without par value was not within the decisions mentioned, that no-par stock is a wholly new kind of stock and should be regarded as the first or original issue by a corporation of that stock. The Court, however, rejected such contention.

In *Edwards v. Wabash Ry. Co.* (C.C.A. 2), 264 Fed. 610, the Wabash Railway had outstanding two classes of preferred stock, A and B, and also common stock. It called in its preferred stock B and converted it, part into preferred A and part into common, and issued new certificates to the holders thereof conferring new and different rights and privileges in the corporate property and management. The Commissioner ruled that the certificates issued in exchange were original issue.

The Railway Company maintained that conversion of preferred stock B into prescribed amounts of preferred A and common stock did not involve an increase of the capital stock of the company but was merely a reclassification of certain existing stock pursuant to an arrangement at the time of organization of the company and that the transaction did not involve an issue of "original" stock. The Court, in upholding this contention, stated (pp. 615-616):

"A stock certificate is a document which is the evidence of the number of shares of stock which the holder of it owns. And the tax is laid, not on each stock certificate that is issued, but on each original issue of certificates. The language is used to indicate

the first issuance of the stock, and this is emphasized by the use of the words, in the same connection, 'whether on organization or reorganization.' When a corporation issues for the first time a certificate of the stock, that certificate is an original issue. The tax is placed on the *original* issue. The word 'original' is defined by Webster as 'pertaining to the origin or beginning; preceding all; first in order.' Plainly, then, it was not intended to tax the plaintiff on each issue of certificates, but only on each original issue of certificates which preceded all other issues which might subsequently be made, when the original certificates were surrendered and new ones issued in their place, either to the original owner or to those to whom the original owners had transferred them.

The taxation of such subsequent issues involving a change of title is provided for in section 4 of schedule A, title VIII, which imposed a tax on transfers, and imposes it, not on the company, but on the holder, and fixes the rate of the tax at 2 cents on each share having a face value of \$100, instead of 5 cents, which is the rate imposed on the company in connection with the original issue.

* * * * *

In the case at bar, when the plaintiff paid at the time of its organization the tax of 5 cents for each \$100 of face value of its total capital stock, including the A stock, and B stock, and the common stock, such payment was made once for all, and constituted the payment of the tax on each original issue of the certificates of stock whenever and to whomsoever delivered. Whenever thereafter the plaintiff delivered the first certificates of the B stock, it was not under obligation to pay again the tax on the B certificates. That had been already done; and when, subsequently,

the plaintiff exchanged the certificates of the B stock for certificates of the A stock and of the common stock, it was not bound to pay again the tax on the certificates. That tax, too, had been already paid. The exchange of stock was an exchange of original certificates of one kind of stock for original certificates of two other kinds of stock, the tax on all of which had been previously paid.”

In each of the cases involving an exchange of shares of stock, wherein the original issue tax was held applicable to the certificates issued in exchange,⁵ there was present one or more of the following elements:

- (a) a contribution of additional capital by the stockholders;
- (b) a transfer of *earned* surplus to capital account;
- or
- (c) a revaluation of assets due to an increment in value, and a transfer of such increment to capital account (the increment itself representing additional earnings—*Com'r v. Wakefield*, 139 F.(2d) 280; *Binzel v. Com'r* (C.C.A. 2), 75 F.(2d) 989, cert. den. 296 U.S. 579).

These cases, wherein the original issue tax was held applicable, however, are readily distinguishable from the present case. Here there was no change in the Old Company's surplus account, no change in the number of its

5. *American Gas & Electric Co. v. United States* (D.C., S.D. N.Y.), 69 F. Supp. 614;
Ohio State Life Insurance Co. v. Busey (D.C., S.D. Ohio), 56 F. Supp. 410;
Rio Grande Oil Company v. Welch (C.C.A. 9), 101 F.(2d) 454.

shares outstanding, and no change in its "Total Stock" account (Tr. 64, Stip. 15). There was no new contribution to capital by the stockholders (Tr. 61, Stip. 12) and no part of the corporate surplus was assigned to capital accounts (Tr. 52, Stip. 6).

The book value of the stock remained unchanged. Prior to the change from par to no-par shares, the total amount in the said capital stock accounts was \$383,581,150.64; after the change to no-par shares, the amount in said accounts was still \$383,581,150.64 (Tr. 61-64, Stips. 13, 15). The change from par to no-par was nothing more than a change in the form of the certificates. There was no revaluation of the properties of the "Old Company with appreciation thereof and increase of values transferred to capital account. There was no change in the assets of the company and no change in the interests of the stockholders. There was an exact exchange. No new shares were created. The rights of the stockholders were neither increased nor lessened by the change from par value stock to no-par value stock.

The only change was the merger of the amount of \$6,304,845 carried in the subsidiary capital stock subaccount with the amount of \$377,276,305.64 carried in the principal capital stock subaccount. Where there had been before the exchange, a breakdown of the "Total Stock" of \$383,581,150.64 into two subaccounts, after the exchange there was no longer any breakdown but instead a merger of the amount in the subsidiary capital stock account with the amount in the principal capital stock account, without, however, any change in the "Total Stock" or book value of the stock (Tr. 61-64, Stip. 13, 15).

What was done in this case was merely an exchange of new certificates of no-par value stock for original certificates of par value stock. All the certificates covering the 210,157 shares of par value stock in respect of which the \$6,304,845 premium on capital stock was realized, were certificates upon which the original issue tax was paid, with the exception of the certificates applying to 5,093 shares which were issued at a time when no original-tax law was in effect and on which a premium of but \$152,970 was realized (Tr. 62-63, Stip. 14). On all remaining parts of the capital stock which were issued during periods when federal stamp taxes were in effect, such stamp taxes were duly paid (Tr. 50, Stip. 4).

No tax was paid in respect to or computed upon the amount of \$6,304,845 premium which was realized at the time the 210,157 shares of par value stock were originally issued (Tr. 65, Stip. 15), *as no tax was due in respect to or computed upon that amount*, all applicable taxes in respect of the certificates to which that amount appertained having been duly paid (Tr. 62-64, Stip. 14).

As stated in *Edwards v. Wabash Ry. Co.* (C.C.A. 2), 264 Fed. 610, 614-5, the original issue tax is laid, not on each certificate or on each issue of certificates, but only on each *original* issue of certificates. It is measured by the par value of all shares in each certificate in cases of par value stock, and by the actual value of all shares in each certificate in cases of no-par value stock. It is immaterial in the case of par value stock what consideration therefor is received by the issuing corporation, whether greater or less than or equal to the par value, as *the tax is not a tax on the capital*, i.e., the assets received by the corporation

upon the original issuance of the certificates, but is a tax on the certificate.⁶

When Congress decreed that the tax should be computed upon the par value in the case of par value stock, it in effect made the premium or excess over par value tax-free by excluding it from the measure of the tax. As Congress has made such excess tax-free, it must have intended that it remain tax-free in the absence of plain language to the contrary, and it cannot fairly be deemed to have intended that the tax should apply to new certificates issued in exchange for certificates of an original issue of par value stock upon which a premium was realized, when all that is done, in addition to the exchange of certificates, is a mere shifting of such excess from one "Total Stock" subaccount to another "Total Stock" subaccount, and where, in the absence of such shifting, the original issue tax unquestionably would not be applicable. When the tax was paid on the original issue of such of the certificates of par value stock as were issued when federal stamp taxes were in effect, it was, as stated in *Edwards v. Wabash Ry. Co.*, 264 Fed. 610, 616, paid once for all; and when thereafter the new no-par value certificates were issued in exchange for the original par value certificates, the company was not bound to pay again the tax on the certificates. The remaining certificates of original issue in respect of which no prior tax was paid were issued during the period when no federal stamp tax levy was imposed and therefore were tax-free. Upon their reissue, no tax became due.

6. *American Gas & Electric Co. v. United States* (D.C., S.D. N.Y.), 69 F. Supp. 614.

II.

There Was No Increase in the Capital of the Old Company, and the Subject Issue Is Specifically Exempt by the Applicable Regulation.

There was no increase in the capital of the Old Company incident to the exchange of the no-par value stock for the par value stock. This, it is submitted, is clear from a consideration, in the light of the record in this case, of the pertinent provisions of the Kentucky statutes and of the applicable regulation.

Chapter 32 of the Kentucky Statutes (Baldwin's 1936 Revision) contains the corporation laws of Kentucky in effect during the period here involved. The provisions thereof dealing with amendments of the articles of railroad corporations are set forth in Article V, Section 764, which reads:

Sec. 764. *Amendment of articles; execution and filing of*—The articles of incorporation may be amended and changed in the manner provided in article one of this chapter; and a copy of any amendment or alteration, attested by the president and secretary of the corporation, shall be filed in the office of the railroad commissioners and the secretary of state within thirty days after its adoption by the corporation; and when so filed, and a certificate of that fact is delivered to the president or secretary, the corporation shall have the right to make such alterations and changes in its business as are authorized by the amended articles.

“Article one,” referred to in Section 764, takes in the sections dealing with corporations generally, including Sections 559 and 564-2, which are set forth in full in the

Appendix. Sections 559 and 564-2, so far as here material, provide:

Sec. 559. *Amendment of articles of incorporation.*
—Any corporation may, by the consent in writing of the owners of at least two-thirds of its capital stock, change or amend any of the articles of its incorporation, and such alteration or amendment shall be signed and acknowledged by the directors, or a majority of them, and filed and recorded as articles of incorporation are required to be.

Sec. 564-2. *Stock without par value.*—Any corporation organized under this law may, if so provided in its certificate of incorporation or in an amendment thereof, issue shares of stock * * * without any nominal par value * * * Such stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the board of directors thereof, pursuant to authority conferred in the certificate of incorporation, * * *

The Old Company was a Kentucky corporation, and it was pursuant to the foregoing provisions that its Articles of Incorporation were amended and the 3,772,763.0564 shares of no-par value stock issued in exchange for the like number of outstanding shares of par value stock. These general provisions, however, do not govern an augmentation of the capital of the corporation. Other provisions of the Kentucky Statutes, hereinafter referred to, set forth in detail the manner in which increases or decreases in the capital of a corporation are to be accomplished; and, in accordance with the established rules of statutory construction that specific provisions prevail over those of a general nature to the extent of any inconsistency, such other provisions are controlling and govern

the procedure to be followed in effecting a valid increase in capital.⁷

Following the amendment of the Articles of the Old Company, it is true, there was a transfer on its books pursuant to the requirements of the Interstate Commerce Commission of the sum of \$6,304,845 from one subaccount of the Total Stock Account to another. But, in determining whether there has been an increase or decrease in the capital of a corporation, book entries alone are not decisive. As stated by this Court in *Rio Grande Oil Co. v. Welch* (C.C.A. 9), 101 F.(2d) 454, 456:

“An increase or decrease in the stated capital of a corporation effects a fundamental change in the corporate structure * * *; and formal action on the part of the corporation is necessary to bring such changes about. In modern practice they are usually governed by statute and, where so governed, changes in stated capital may be effected only through pursuit of the statutory method.”

Section 771, Article V, and Sections 553 and 564-1, Article I, Chapter 32, Kentucky Statutes, which sections are set forth in full in the Appendix, provide how the capital of a railroad corporation may be increased. Those sections, so far as here material, provide:

Sec. 771. *Borrowing and mortgaging to complete or operate road; preferred and common stock; rights of each class.* Corporations [railroads] organized under this law * * * may in the manner provided in article I of this chapter increase or decrease in its

7. *Sutherland's Statutory Construction*, 3d Ed., Sec. 5204; 59 *C.J.* 1000-1001; *Oppenheimer v. Commonwealth*, 305 Ky. 146, 202 S.W.(2d) 373; *Ingram v. Commonwealth*, 176 Ky. 706, 197 S.W. 411, 413.

capital stock; and the increased stock may be common or preferred as shall be designated in the call for the meeting of stockholders.

Sec. 553. *Capital stock; manner of increasing or reducing.*—Any corporation may increase or reduce its capital stock at any time by a vote of, or by the written consent of, stockholders representing two-thirds of its capital stock, and after notice of the proposed increase or decrease has been mailed to the address of each stockholder at least twenty days before the meeting is held for that purpose; and a statement of the increase or reduction shall be signed and acknowledged by the president and a majority of the directors, and filed and recorded in the same manner as articles of incorporation; * * *

Sec. 564-1. *Corporation may divide its shares into classes; common and preferred stock; increase of stock; rights of holders in dissolution.*— * * * Any [corporation organized under this law], all of whose outstanding stock is common stock, may by a resolution adopted by the vote of the holders of not less than two-thirds in amount of its outstanding capital stock, cast in person or by proxy, at a special meeting of stockholders called for the purpose and of which notice shall have been given as provided in the by-laws of the company, at least twenty days before the date of the meeting, or at the annual meeting of the stockholders of the company, or by the written consent of the holders of not less than two-thirds in amount of its capital stock, distribute or convert its outstanding capital stock into preferred and common stock in such proportion as shall be fixed by such resolution or written consent * * * And by a resolution adopted by the like vote or by such written consent, the capital stock of any corporation may be increased and the increased stock may be common or

preferred stock, or partly one and partly the other, as may be fixed by such resolution or written consent * * *

The words "capital stock," as used in the foregoing provisions, designate the amount of capital contributed by the stockholders for the use of the corporation, that is, the amount paid in by the stockholders of the corporation, in money, property or services, with which to conduct its business.⁸ They mean a genuine addition to the property, permanently dedicated to the business enterprise for the prosecution of which the corporation was organized.⁹

It will be noted from the provisions of Section 553 that if a corporation desires to increase its capital it can do so only by an instrument in writing, which must specifically state on its face the amount of the proposed increase and must be filed and recorded in the same manner as Articles of Incorporation. While Section 564-1 does not itself specifically provide for the filing of an amendment setting forth the amount of a proposed increase in capital, that section must be construed with Section 764 above referred to, which does specifically require such filing. In view of this, it is clear that, if it had been desired to increase the capital of a Kentucky railroad corporation under the provisions of Section 564-1, it could be done only by the filing of an amendment containing a statement of such increase.

There is nothing in the record of this case to indicate any attempt to conform to those provisions of the Ken-

8. *Haggard v. Lexington Utilities Co.*, 260 Ky. 261, 84 S.W. (2d) 84, 87.

9. *Hood River Co. v. Commonwealth*, 131 N.E. 201.

tucky law and thereby effect an increase in the capital of the Old Company, nor is there any suggestion in the record that the Old Company entertained such a purpose. It will be noted from the stipulation that both the resolution adopted by the Board of Directors (Tr. 55-58, Stip. 9) and that adopted by the stockholders (Tr. 59-61, Stip. 11) failed to mention or disclose any intent to increase the capital of the Old Company. The Certificate of Amendment (Tr. 52-53, Stip. 7) that was filed in accordance with the requirements of the Kentucky Statute merely provided:

“That the authorized capital stock of said Company consisting of 5,944,518 common shares of the par value of \$594,451,800, of which 3,772,763.0564 shares are issued and outstanding, and 2,171,754.9436 shares are unissued, be changed into the same number of common shares without nominal par value;

That 3,772,763.0564 shares of said shares without nominal par value be substituted, share for share, for the said presently issued and outstanding shares of the par value of one hundred dollars (\$100) each;

That the unissued 2,171,754.9436 shares of said authorized shares without nominal par value may be issued by the Company from time to time in such amounts, upon such terms, for such proper corporate purposes, and for such consideration or considerations as may be fixed from time to time by the Board of Directors.”

It is clear that the amendment provided for no more than a change in the character of the stock, with authority to issue the shares in excess of those to be exchanged for such consideration as the Board of Directors may fix from time to time.

There is no presumption that the process involved an increase in capital,¹⁰ nor was there any effort to issue in disguise a stock dividend. No new shares were created. When the exchange of certificates of the old for the new shares of stock had been effected, the stockholders were unchanged. The relative holdings of the then issued and outstanding stock and the rights and burdens of membership in the corporation were the same, while the corporate assets and liabilities, including total stock liability, had been neither increased nor diminished. There was no change in the Surplus Account, no change in the number of shares outstanding, and no change in the Total Stock Account (Tr. 64, Stip. 15). There was no new contribution to capital by the stockholders (Tr. 61, Stip. 12), and no part of the corporate surplus was assigned to Capital Account (Tr. 52, Stip. 6) and distributed in connection therewith as a stock dividend.

The premium on capital stock, under the Kentucky corporation laws, could equally as well have been distributed as dividends after the exchange as before. If there was no statutory impediment to such distribution before the exchange, there was none thereafter. The only prohibition against the declaration and payment of dividends under the Kentucky corporation law is set forth in Section 548, Chapter 32, Kentucky Statutes (now Section 271.220 KRS). That section reads:

Sec. 548. *Directors; when liable for debts of corporation.*—If the directors of any incorporated company shall declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would

10. *Rio Grande Oil Co. v. Welch* (C.C.A. 9), 101 F.(2d) 454.

diminish the amount of its capital stock, they shall be jointly and severally individually liable for all debts of the corporation then existing, and for all that shall be thereafter incurred while they, or a majority of them, continue in office. (1893, c. 171, p. 612, Sec. 11.)

It will be noted that the prohibition, where insolvency is not involved, is directed against the payment of any dividend only where the effect of such payment would be to diminish the amount of the capital stock. The action taken by the stockholders and directors of the Old Company was ineffectual under Kentucky law to increase the capital stock of the Old Company, and therefore the amount of its capital stock was the same after the exchange as before; consequently, the statutory right of the directors to declare and pay dividends was unaffected by the transfer to the Capital Stock Subaccount of the amount theretofore carried in the Premium on Capital Stock Subaccount.

In view of the foregoing, it is respectfully submitted that there was no increase in the capital of the Old Company incident to the exchange of no-par value stock for the outstanding shares of par value stock.

The applicable regulation itself expressly recognized that the transaction was tax-exempt. Reg. 71 (1932 Ed.), Art. 29(i), which was in effect as of April 23, 1940, the date of the exchange, cites, as an example of an issue not subject to the tax:

“(i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected without the capital of the corporation being increased, either by transfer of surplus to capital account or otherwise.”

The word “capital” may have different meanings when used in different connections. It must be construed in the regulation by reference to the context and other rules of construction. It apparently is the position of the Commissioner of Internal Revenue that in this instance it means “capital stock” or “legal capital.” Even if this were so, the provision nevertheless would be controlling in this instance, for, as has been clearly established, the action taken by the Old Company, its stockholders and its directors, even had it been so intended, would have been ineffective to create a valid increase in the capital of the Old Company.

It is respectfully submitted, however, that, as used here, the word “capital” means the amount invested by the stockholders in the corporation, whether representing “legal capital”—that is, property sufficient to balance the capital stock liability—or paid-in surplus or capital surplus in any form.

It will be observed that the word “capital” is used in the regulation and not “capital stock” or “legal capital,” from which it is clear that the word “capital” as used relates to the capital account. That this is the meaning properly to be ascribed to the word is confirmed by the use in the regulation of the phrase “either by transfer of surplus to *capital account* or otherwise.” These latter words are not to be ignored. They do not constitute a

limitation upon the word "capital" but plainly broaden it. They clearly evidence the fact that the "capital" referred to in the regulation is the capital that, in accordance with sound and accepted accounting procedure, is included in "capital account." If by transfer of surplus to "capital account" additional "capital" is created, it must necessarily follow that the terms "capital account" and "capital," as used in the regulation, are synonymous.

Fundamentally, surplus is divided into capital surplus and earned surplus. Accretions to capital arising from premiums on capital stock are known as "capital surplus."¹¹ The amount received from premium on capital stock is clearly a capital receipt.¹² As used in the regulation, the unqualified word "surplus" undoubtedly means that part of the surplus which was derived from profits which at the close of earlier accounting periods were carried into surplus as undistributed earnings of the business. It has no application to capital, or paid-in, surplus arising from premium on capital stock. The capital account includes the paid-in surplus and there can be no "transfer" to capital account of something which is already there.

These views find ample support in the decisions of the Board of Tax Appeals (now Tax Court) and in the regulations of the Treasury Department itself.

In *Jarvis*, 43 BTA 439, aff'd 123 F.(2d) 742, where the corporation involved was organized with authorized capi-

11. *Montgomery, Auditing Theory and Practice*, 4th Ed., p. 329; *Hatfield, Sanders and Burton, Accounting Principles and Practices* (1940 Ed.), pp. 250, 264; *Paton's Advanced Accounting* (1941 Ed.), pp. 522-523.

12. *Montgomery, Auditing Theory and Practice*, 4th Ed., p. 634.

tal stock of \$1,000,000 represented by 10,000 shares and began business with a paid-in surplus of \$911,499.66, the Board stated (p. 444):

“The Acheson corporation has but one ‘capital account’ and that account consists of the original amount received for its capital stock, comprising both the par value and the paid-in surplus, *August Horrmann*, 34 BTA 1178, 1186-7; *Arthur C. Stifel*, 29 BTA 1145, 1150.”

Moreover, under each of the revenue acts from 1918 to 1932, inclusive, the Treasury regulation¹³ in respect to the acquisition or disposition by a corporation of its own stock was as follows:

“The proceeds from the original sale by a corporation of its shares of capital stock, whether such proceeds are in excess of or less than par value of the stock issue, constitute the capital of the company. If the stock is sold at a premium, the premium is not income. Likewise, if the stock is sold at a discount, the amount of the discount is not a deductible loss from gross income.”

In 1934 this regulation was amended so as to make taxable those transactions where a corporation dealt in its own shares as it might have done in the shares of another corporation, but such amendment did not effect any change in the foregoing principle.

It is of no consequence that the ascertainment of the fact that the capital account comprises both the par value and the paid-in surplus, or that the premium on capital

13. Art. 542, Reg. 45; Art. 543, Regs. 62, 65, 69; Art. 66, Regs. 74, 77.

stock constitutes a part of the capital of the company, may have been for different uses under the decisions and regulation mentioned; the fact is the same irrespective of its use for those purposes or for the purpose of determining whether the capital of a corporation has been increased within the meaning of the subject regulation.

These views also find full support in the subsequent corresponding regulation, Section 113.25(f), Reg. 71 (1941 Ed.), which amended the applicable regulation in effect as of April 23, 1940, the date the no-par value stock was exchanged for the par value stock. The regulation as amended reads as follows:

“The following issues are not subject to tax:

* * * * *

(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise.”

This amended regulation in substance is the same as the prior regulation which it superseded, and it is respectfully submitted that were it controlling in the present instance it would support the position of the appellant as hereinabove set forth.

As heretofore shown, “capital account” comprises both “legal capital” and “paid-in surplus.” It does not include “earned surplus,” which is a component of the “income account.” The amended regulation speaks of *earned* surplus. It is significant that in amending the language and eliminating the reference to “capital account” incorporated in the prior regulation, the Treasury Department deemed it necessary to interpolate the word

“earned” before the word “surplus,” where only the latter word had previously appeared. The word “earned” undoubtedly was used in the amended regulation in contrast to “paid-in,” with the intention of emphasizing the fact that the “additional capital” referred to is the capital which, in accordance with sound and established accounting practices, is included in capital account, and also to emphasize the fact that there can be no “transfer” of “paid-in surplus” to “capital” inasmuch as “paid-in surplus” is a capital receipt which, when paid in by the stockholders, immediately becomes a part of “capital.” The use of the word “earned” indicates a conscious intent on the part of the Treasury Department to phrase the revised language in such a manner that the amended regulations should not be construed as constituting a change in the substance of the prior regulation. If this were not so, no purpose would be served by the presence of the word “earned.”

The words “or otherwise,” as used in the regulation, do not negative this conclusion. Those words contemplate a “dedication of additional capital” to capital account by some means other than a “transfer of earned surplus.” They contemplate the addition to capital account of something new which has been created or contributed, and do not contemplate something which has previously become a component of the capital account as an incident to an earlier issuance of certificates. They do not comprehend “paid-in surplus” realized upon the issuance of prior tax-paid or tax-free certificates, which already exists in the capital account at the time of the recapitalization or reorganization. Where, as in this instance, no additional

capital has been created or realized, there can be no "dedication of additional capital."

There is nothing in the fact that in this instance the capital surplus in the Premium on Capital Stock Sub-account was transferred to the Capital Stock Subaccount to justify the inference that there was or was intended to be any dedication of additional capital within the meaning of the regulation. The Bureau of Internal Revenue itself has ruled that the transfer from capital surplus to capital stock does not give rise to the original-issue tax.

In Bureau letter dated May 10, 1940, 403 CCH, par. 6281, it was held that no original issue stamp taxes were incurred as a consequence of the recapitalization of a corporation resulting in an increase in the capital stock account, where such increase was effected by transferring from the capital surplus account the exact amount necessary to consummate the increase in the capital stock account and where no new shares were issued to persons other than the old stockholders. That case involved an exchange of 4% \$100-par preferred stock for outstanding 8% preferred and an exchange of new \$10-par common for outstanding no-par common. The Commissioner, in his ruling to the Collector in that case, stated:

"Before the exchange is made the total capital stock of the corporation will be in the amount of \$104,962.00, consisting of 1,000 shares of \$100.00 par value 8 per cent preferred stock and 4,962 shares of no par value common stock, having a stated value of \$1.00 per share. Subsequent to the exchange the total capital stock account will be in the amount of \$199,620.00, representing an increase of \$50,000.00 in the preferred stock and \$44,658.00 in the common

stock. The increase in the capital stock account has been effected by transferring an amount of \$94,658.00 from the company's capital surplus account, to which account there was credited in July, 1930, the amount by which the capital stock was reduced, namely, \$499,158.00.

On the basis of the analyses of the capital stock accounts as set forth above, this office concludes that no stamp taxes have been incurred as a result of the recapitalization of August 1, 1939. This is so for the reason that the increase in the capital stock account was effected by transferring from the capital surplus account the exact amount necessary to consummate the increase in the capital stock accounts. It is immaterial that part of the increase is reflected in the preferred capital stock account and part in the common capital stock account. The total amount by which the capital stock accounts were increased by virtue of the recapitalization of August 1, 1939, was not greater than the amount of capital transferred to capital surplus in 1930, which amount has previously been subject to the issue tax. No stamp tax is therefore incurred on the issuance of the new shares."

The position which appellant maintains in this case is consistent with the foregoing ruling. There the capital surplus transferred to capital stock was realized upon the issuance of tax-paid certificates. Here the capital surplus of \$6,304,845 transferred to the Capital Stock Subaccount likewise was realized upon the issuance of tax-paid certificates, with the exception of the small amount of \$152,790 which was realized upon the issuance of tax-free certificates. The ruling, it is true, states that the amount of capital there transferred to Capital Stock "has previously

been subject to the issue tax.” However, it is not the “amount” which is subject to the issue tax. The tax is not on the “amount” but is on the certificate in respect of which the amount is realized.¹⁴ Here the certificates in respect of which the \$6,304,845 was realized were either tax-paid or tax-free. They had been either previously subject to the issue tax or free of any issue tax; and upon their reissue, no tax became due. The principle of the foregoing ruling, therefore, is equally applicable here.

III.

The Commissioner of Internal Revenue May Not Resort to the Rules of the Interstate Commerce Commission Adopted for Other Purposes, for the Purpose of Levying Taxes Under the Internal Revenue Code.

In connection with the exchange of stock certificates here involved, there was, as previously stated, no additional contribution by the stockholders to the capital of the corporation (Tr. 61, Stip. 12) nor any transfer of any part of the surplus to capital account (Tr. 52, Stip. 6). The corporate assets, its capital and surplus and liabilities (Tr. 64, Stip. 15), and its stockholders, were in precisely the same situation after the exchange as before, except that each holder of a certificate of common stock of \$100 par value had in lieu thereof at the end of the transaction one share without nominal or par value. The only change was the merger of the \$6,304,845 theretofore carried in the Premium on Capital Stock Subaccount with the \$377,276,305.64 theretofore carried in the Capital Stock Subaccount. This change was effected, however, without

14. *American Gas & Electric Co. v. United States* (D.C. S.D. N.Y.), 69 F. Supp. 614.

any change in the Total Stock liability of \$383,581,150.64 (Tr. 64-65, Stip. 15). Under the requirements of the Interstate Commerce Commission, of which this Court takes judicial notice,¹⁵ it was mandatory upon the Old Company to make this change. In the absence of the directive of the Interstate Commerce Commission that such procedure be followed, no necessity would have existed for the merger of the two amounts. The capital account could have been maintained after the exchange as a single accounting element broken down into its component parts in the same manner as it was before the exchange.

Had the merger of the two amounts not occurred, the Commissioner of Internal Revenue undoubtedly would not have questioned the applicability in this instance of the principle of *Edwards v. Wabash Ry. Co.*, 264 Fed. 610, and *Cleveland Provision Co. v. Weiss*, 4 F.(2d) 408, and no original issue tax would have been exacted. It is only by reason of the merger of the two amounts that the Commissioner contends that the original issue tax is applicable here.

Not only is it manifestly inequitable that a taxpayer should be penalized by one government agency merely for doing that which another co-ordinate government agency requires it to do, but also such procedure is wholly without warrant in the law. The Supreme Court of the United States in *Old Colony Rd. Co. v. Commissioner*, 284 U.S. 552, 562, expressly held that the Commissioner of Internal Revenue may not resort to the rules of the Interstate Commerce Commission, made for other purposes, for the

15. *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 488; *Uniform System of Accounts for Steam Railroads* prescribed by Interstate Commerce Commission.

determination of tax liability under the revenue acts—which is precisely what the Commissioner of Internal Revenue did in this instance.

The Accounting Rules of the Commission were adopted for the purpose of reflecting conveniently and uniformly the financial position of those companies whose accounting is subject to its authority. By these rules the Commission did not purport to change the legal aspects of corporate action and, indeed, it has no power to do so since the internal affairs of a company are subject to the laws of the state in which it is incorporated.¹⁶ We have pointed out *supra*, pages 22-26, that no action pursuant to Kentucky law was taken by the Old Company augmenting or otherwise changing its capital. No change in the legal capital of the Old Company would or could have occurred merely by conformity to a change required by the Commission as to the description of the \$6,304,845 of premiums previously received in the sale of capital stock.

The common-sense explanation of the whole matter is that the Commission, in formulating its Accounting Rules, felt that “premium on capital stock” was appropriate, when par value stock is involved, to describe the excess received over par, but was not appropriate to describe any part of the price received on the sale of no-par value stock. So when par value stock was exchanged for no-par value stock, it required a change in the description of the premium by the device of requiring the amount of the premium to be transferred from Subaccount 753 “Premium on Capital Stock,” to Subaccount 751, “Capital

16. *Callaway, as Trustee of the property of Central of Georgia Ry. Co. v. Benton*, Sup.Ct. of U.S., No. 21, Oct. Term 1948, dec. Feb. 7, 1949.

Stock." There is nothing to indicate that the Commission was seeking to require any substantive change in the capital or corporate structure of the Old Company. The Accounting Classification and Regulations of the Commission are promulgated by it pursuant to the authority over the accounting of carriers conferred by paragraphs (3) and (5), Section 20, of the Interstate Commerce Act (49 USCA, 1948 Supp. p. 30), and it should not be inferred that the Commission, under the guise of issuing accounting rules, was going further and requiring a change in the legal capital of carriers.

The Commission's accounting regulations went to nomenclature, the appropriate description of sums which had been received as premiums on the sale of stock. They did not change the substantive capital of the Old Company so as to enhance or decrease the ability of that company to pay dividends. No such matter was submitted to the stockholders of the Old Company as would be required by Kentucky law. The Commissioner of Internal Revenue has seized upon accounting rules relating to proper terminology and nomenclature for the entirely different purpose of asserting that there was an increase in capital and consequently an event giving rise to the tax liability asserted. This is precisely what the Supreme Court said the Commissioner could not do in *Old Colony Rd. Co. v. Commissioner*, *supra*.

It may be that equitable considerations do not have much play in determining liability for excise taxes. If there had been an increase in capital as a result of this transaction in the amount of \$6,304,845, as contended by appellee, the Old Company became vulnerable to the im-

position of a tax as on an original issue of 3,772,763.0564 no-par value shares, replacing the same number of shares with an aggregate value of \$377,276,305.64. This does not seem equitable, but the answer of appellee and of the Court below is that there was such an intermingling of the large amount of old capital and the comparatively small amount of alleged new capital that a tax on the issuance of all the shares cannot be avoided. However, the taxpayer may reasonably ask that the premise upon which this seemingly untoward result is predicated be clearly established. There is still some vitality to the often repeated rule that provisions of taxing statutes are not to be extended by implication beyond the import of the language used, or so as to enlarge their operation or to embrace matters not specifically pointed out.¹⁷ Here the Commissioner may not seize upon a change of nomenclature arising from the shifting of a sum from one capital account to another as required by the Commission, to assert that there was a dedication of additional capital, unintended by stockholders or directors, giving rise to the asserted tax liability.

17. *Edwards v. Wabash Ry. Co.* (C.C.A. 2), 264 Fed. 610, 616-617;

Gould v. Gould, 245 U.S. 151;

United States v. Field, 255 U.S. 257, 18 A.L.R. 1461;

United States v. Woodward, 256 U.S. 632;

Smietanka v. First Trust and Savings Bank, 257 U.S. 602;

McFeely v. Commissioner, 296 U.S. 102, 111.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the 3,772,763.0564 shares of no-par value stock issued in exchange for the same number of par value shares was not an original issue within the meaning of the applicable statute and regulations, and the judgment should be reversed, with instructions to the Court below to enter judgment in favor of appellant for the recovery from appellee of the sum of \$46,687.95 together with interest on said sum from February 26, 1943, as provided by law, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

GEORGE L. BULAND

FRANK J. GALLAGHER

Attorneys for Appellant

Dated at San Francisco, February 16, 1949.

(Appendix follows)

APPENDIX

KENTUCKY STATUTES

Chapter 32

Corporations; Private

ARTICLE I.

General Provisions Concerning

§548. *Directors; when liable for debts of corporation.*

—If the directors of any incorporated company shall declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally individually liable for all debts of the corporation then existing, and for all that shall be thereafter incurred while they, or a majority of them, continue in office. (1893, c. 171, p. 612, §11.)

§553. *Capital Stock; manner of increasing or reducing.*

—Any corporation may increase or reduce its capital stock at any time by a vote of, or by the written consent of, stockholders representing two-thirds of its capital stock, and after notice of the proposed increase or decrease has been mailed to the address of each stockholder at least twenty days before the meeting is held for that purpose; and a statement of the increase or reduction shall be signed and acknowledged by the president and a majority of the directors, and filed and recorded in the same manner as articles of incorporation; but no increase of the capital stock of a banking or trust company shall be valid until the amount thereof has been bona fide sub-

scribed, and one-half thereof actually paid in, and the remainder shall be paid in within one year. (1893, c. 171, p. 612, §16.)

§559. *Amendment of articles of incorporation.*—Any corporation may, by the consent in writing of the owners of at least two-thirds of its capital stock, change or amend any of the articles of its incorporation and such alteration or amendment shall be signed and acknowledged by the directors, or a majority of them, and filed and recorded as articles of incorporation are required to be. (1893, c. 171, p. 612, §22.)

§564-1. *Corporation may divide its shares into classes; common and preferred stock; increase of stock; rights of holders in dissolution.*—Any corporation organized under this law may divide its shares into classes, such as preferred, common and deferred shares, or as may be otherwise designated, and it may give to each of the several classes such priority of right in the payment of the dividends, and in the redemption of the shares, as may be prescribed in the rules and regulations adopted by the shareholders; and may provide that the holders of its bonds shall be entitled, upon terms prescribed by it, to convert the same into the stock of the corporation, whether common or preferred, and that holders of its preferred stock shall be entitled, upon terms prescribed by it, to convert the same into the bonds or other obligations of the corporation. No preferred stock shall be issued except for cash or its equivalent, nor for less than the par value of the shares, which shall be stated in the certificates representing the preferred and common stock respectively. Any such corporation, all of whose outstanding stock is

common stock may, by a resolution adopted by the vote of the holders of not less than two-thirds in amount of its outstanding capital stock, cast in person or by proxy, at a special meeting of stockholders called for the purpose and of which notice shall have been given as provided in the by-laws of the company, at least twenty days before the date of the meeting, or at the annual meeting of the stockholders of the company, or by the written consent of the holders of not less than two-thirds in amount of its capital stock, distribute or convert its outstanding capital stock into preferred and common stock in such proportion as shall be fixed by such resolution or written consent: Provided, that all holders of stock of the company at the time of such distribution shall be entitled to the same pro rata proportions of such preferred and common stock. And by a resolution adopted by the like vote or by such written consent, the capital stock of any corporation may be increased and the increased stock may be common or preferred stock, or partly one and partly the other, as may be fixed by such resolution or written consent. Any such preferred stock hereinbefore referred to shall be entitled to receive quarterly, semi-annual or annual dividends thereon at such rate as may be prescribed by the resolution or written consent under which the same was issued, and such dividends shall be payable as provided in the said resolution or written consent, before any dividends shall be declared on the common stock; and on the dissolution of the company, voluntary or otherwise, the holders of preferred stock shall be entitled to have their shares redeemed at par before any distribution of any part of the assets of the company shall be made to the

holders of the common stock. (April 5, 1893, c. 171, p. 612, §27; March 25, 1904, c. 105, p. 257; March 3, 1910, c. 79, p. 231, as amd. March 1, 1926, c. 73, p. 198, subs. 1.)

§564-2. *Stock without par value.*—Any corporation organized under this law may, if so provided in its certificate of incorporation or in an amendment thereof, issue shares of stock (other than stock preferred as to dividends or preferred as to its distributive share of the assets of the corporation or subject to redemption at a fixed price) without any nominal par value. Every share of such stock without nominal par value shall be equal to every other share of such stock, except that the certificate of incorporation may provide that such stock shall be divided into different classes with such designations and voting powers or restriction or qualification thereof as shall be stated therein, but all such stock shall be subordinate to the preferences given to preferred stock, if any. Such stock may be issued by the corporation from time to time by the board of directors thereof, pursuant to authority conferred in the certificate of incorporation, or if such certificate shall not so provide, then by the consent of the holders of two-thirds of each class of stock then outstanding and entitled to vote given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws and any and all such shares so issued, the full consideration for which has been paid or delivered, shall be deemed full paid stock and not liable to any further call or assessment thereon, and the holder of such shares shall not be liable for any further payments under the provisions of this chapter. In any case in which the law requires that the par value of the shares

of stock of a corporation be stated in any certificate or paper, it shall be stated, in respect of such shares, that such shares are without par value, and whenever the amount of stock, authorized or issued, is required to be stated, and it shall also be stated that such shares are without par value.

For the purpose of taxes prescribed to be paid on the filing of any certificate or other paper relating to corporations and of franchise taxes prescribed to be paid by corporations to this State, but for no other purpose, such shares shall be taken to be of the par value of one hundred dollars each. But for such purposes of taxation, if any corporation heretofore incorporated with capital stock of a fixed par value shall change its capital stock from a fixed par value to no par value, under the provisions of this section, and shall have paid the organization tax required upon its fixed par value, then no additional organization tax shall be required upon the change of capital stock with a fixed par value to capital stock of no par value; unless, at the time of such change, or any time thereafter, there shall be paid into the treasury of any such corporation, additional capital by the stockholders, voluntarily or under assessment, then the actual amount of such increase shall be reported to the Secretary of State, and the organization tax fixed by law paid thereon. (1934, c. 55, §1; 1926, c. 72, p. 198, subs. 2. Eff. June 14, 1934.)

ARTICLE V.

Railroads

§764. *Amendment of articles; execution and filing of.*—The articles of incorporation may be amended and changed in the manner provided in article one of this

chapter; and a copy of any amendment or alteration, attested by the president and secretary of the corporation, shall be filed in the office of the railroad commissioners and the secretary of state within thirty days after its adoption by the corporation; and when so filed, and a certificate of that fact is delivered to the president or secretary, the corporation shall have the right to make such alterations and changes in its business as are authorized by the amended articles. (1893, c. 171, p. 612, §183.)

§771. *Borrowing and mortgaging to complete or operate road, preferred and common stock; rights of each class.*—Corporations organized under this law shall have power to borrow such sums of money as may be necessary for funding their floating debt or for completing, equipping or operating their road or any part thereof, or for paying any debt incurred for such purpose, and to issue and dispose of their bonds and obligations for any amount necessarily borrowed for such purpose, and to mortgage their corporate property, franchise or any part thereof to secure the payment of any debt contracted or to defray any expenditures for the purposes aforesaid; and may in the manner provided in article I. of this chapter increase or decrease in its capital stock; and the increased stock may be common or preferred as shall be designated in the call for the meeting of the stockholders. If preferred stock be issued the company may guarantee to the holders thereof semi-annual or quarterly dividends, to an amount not exceeding six per cent. per annum payable at its office or at such other places as the directors may designate. The stock may be sold at such time and place, either within or without the state, as may be deemed advisable,

and the proceeds thereof applied for the purposes for which it was issued; the common stock of the company shall be entitled to dividends only out of the surplus of the profits after setting apart a sum sufficient to pay the dividends upon the preferred stock; and the company which issues such preferred stock shall reserve the privilege of redeeming and cancelling same at par at any time after three years from the date of its issue. (1916, c. 46, p. 490, §3, amending 1893, c. 171, p. 612, §190; 1904, c. 105, p. 257, §2.)

No. 12,117

IN THE
United States Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation),

Appellant,

vs.

HAROLD BERLINER, former Collector of
Internal Revenue for the First Col-
lection District of California,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Summary of argument	10
Argument	12
The exchange of taxpayer's \$100 par value stock for no par value stock, accompanied by a transfer of \$6,304,845 from "premium on capital stock" account to "capital stock" account, was an original issue of shares of stock and subject to tax under Sections 1800 and 1802(a) of the Internal Revenue Code	12
Conclusion	25

Table of Authorities Cited

Cases	Pages
American Gas & Electric Co. v. United States, 69 F. Supp. 614 (S.D. N.Y.)	12
American Laundry Machinery Co. v. Dean, 292 Fed. 620 (S.D. Ohio)	13
Cleveland Provision Co. v. Weiss, 4 F. 2d 408 (N.D. Ohio)	13
Cuba R. Co. v. United States, 60 C. Cls. 272	13
Edwards v. Wabash Ry. Co., 264 Fed. 610 (C.A. 2d)	13
Eisner v. Macomber, 252 U. S. 189	17
Goodyear Tire & Rubber Co. v. United States, 60 C. Cls. 448	13
Haggard v. Lexington Utilities Co., 260 Ky. 261	15, 20
In re Grant-Lees Gear Co., 1 F. 2d 393 (N.D. Ohio)	13
Lewis, Secretary of State v. Oscar C. Wright Co., 234 Ky. 814	14, 21
Ohio State Life Ins. Co. v. Busey, 56 F. Supp. 410 (S.D. Ohio)	12
Old Colony R. Co. v. Commissioner, 284 U. S. 552	25
Peake v. Thomas, 222 Ky. 405	14
Rio Grande Oil Co. v. Welch, 101 F. 2d 454	12, 18
Standard Mfg. Co. v. Heiner, 300 Fed. 252 (W.D. Pa.)	13
Trumbull Steel Co. v. Routzahn, 292 Fed. 1009 (N.D. Ohio)	13
United States v. Pure Oil Co., 135 F. 2d 578 (C. A. 7th) ..	13
W. T. Grant Co. v. Duggan, 94 F. 2d 859 (C.A. 2d)	12
West Virginia Pulp & Paper Co. v. Bowers, 293 Fed. 144 (S.D. N.Y)	13
Williams v. Davis, 297 Ky. 626	20

Statutes	Pages
Internal Revenue Code:	
Section 1800	2, 3, 10, 12, 13
Section 1802(a)	2, 10, 12, 13, 16, 18
Section 3772	2
Judicial Code, Section 24	2
Kentucky Revised Statutes (1948), Section 271.265.....	15
Kentucky Statutes, Section 548 (Carroll's Kentucky Statutes Annotated (Baldwin's 1936 rev.), c. 32).....	15
Kentucky Statutes, Sections 553 and 564-1	22
Kentucky Statutes, Section 564-2	20, 22
26 U.S.C. 1946 ed., Section 1800	3
26 U.S.C. 1946 ed., Section 1802	4
28 U.S.C., Section 1291	2
28 U.S.C., Section 1340	2

Regulations

Revenue Act of 1939, Section 1, c. 247, 53 Stat. 862.....	3
Treasury Regulations 71 (1932 ed.), Article 28 (c).....	17
Treasury Regulations 71 (1932 ed.), Article 29(i).....	16
Treasury Regulations 71 (1932 ed.), Section 113.25(f).....	17
Treasury Regulations 71 (1941 ed.), Section 113.24.....	4
Treasury Regulations 71 (1941 ed.), Section 113.24(d).....	17
Treasury Regulations 71 (1941 ed.), Section 113.25	4
Treasury Regulations 71 (1941 ed.), Section 113.25(f)....	12, 17

Texts

Grange, Corporation Law for Officers and Directors (1935), page 243	14, 15, 16
Graham and Katz, Accounting in Law Practice (2d ed., 1938), page 135	14, 15
Mitchell, Capitalization of Corporations Issuing Shares Without Par Value, 11 A.B.A.J. 377, 380 (1925).....	15
Paton, Accountants' Handbook (2d ed., 1937), page 963...	14



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On Appeal from the United States District Court for the
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BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the District Court (R. 72-77) is not yet reported.

JURISDICTION.

This appeal involves a claim for refund of documentary stamp tax in the amount of \$46,687.95 with interest. (R. 79-80.) The tax was paid under protest to the appellee on or about February 26, 1943.

(R. 66.) Claim for refund was timely filed on or about June 11, 1943 (R. 66), and was rejected by the Commissioner of Internal Revenue on March 9, 1944. (R. 66-67.) Suit for refund was filed in the District Court on or about February 9, 1946 (R. 17), conformably with Section 3772 of the Internal Revenue Code. The District Court had jurisdiction of the case under Section 24, Fifth, of the Judicial Code, now 28 U. S. C., Section 1340. The judgment of the District Court was entered October 29, 1948. (R. 81-82.) Notice of appeal was filed November 26, 1948 (R. 82), conformably with 28 U. S. C., Section 1291, upon which the jurisdiction of this Court rests.

QUESTION PRESENTED.

Whether taxpayer incurred original issue tax under Section 1802(a) of the Internal Revenue Code when it issued 3,772,763.0564 shares of no par value stock in exchange for the like number of outstanding shares of \$100 par value stock and transferred \$6,304,845 from its "premium on Capital Stock" account to "Capital Stock" account.

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code:

SEC. 1800. IMPOSITION OF TAX.

There shall be levied, collected, and paid, for and in respect of the several bonds, debentures,

or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, * * * the several taxes specified in such sections.

(26 U.S.C. 1946 ed., Sec. 1800.)

SEC. 1802. CAPITAL STOCK (AND SIMILAR INTERESTS).

(a) [As amended by Section 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Original Issue*.—On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation * * * holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 * * *, on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation * * * (or of the shares where no certificates were issued), 10 cents until July 1, 1941, and 5 cents thereafter; *Provided*, That where such shares or certificates are issued without par or face value, the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, per share * * *, unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents until July 1, 1941, and 1 cent thereafter, on each \$20 of actual value, or fraction thereof, of such certificates (or of the shares where no certificates

were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1802.)

Treasury Regulations 71 (1941 ed.), promulgated under the provisions of the Internal Revenue Code relating to stamp taxes:

SEC. 113.24. ISSUES SUBJECT TO TAX.

The following are examples of issues subject to the tax:

* * * * *

(d) Stock issued as a dividend and fractional script certificates.

* * * * *

SEC. 113.25. ISSUES NOT SUBJECT TO TAX.

In addition to the various issues specifically exempt under section 1808, as to which see Subpart J, the following are examples of issues not subject to the tax:

* * * * *

(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise.

STATEMENT.

The facts, which were stipulated (R. 49-71), may be summarized as follows:

Taxpayer is a Delaware corporation having its principal office in San Francisco, California. Prior to September 30, 1947, it existed as a Kentucky corporation and was engaged in business in interstate commerce as a common carrier by rail. Between January 1, 1943, and March 31, 1945, the appellee was the duly, appointed, qualified and acting United States Collector of Internal Revenue for the First Internal Revenue District of California. He is not now in office as such collector but is a resident of the State of California and of the Southern Division of the United States District Court for the Northern District of California. (R. 49-50.)

Between the date of its incorporation as a Kentucky corporation and April 23, 1940, taxpayer¹ issued and had outstanding on that date 3,772,763.0564 shares of capital stock having a par value of \$100 a share, of which 3,562,606.0564 shares were issued at par and 210,157 shares were issued at a premium of \$6,304,845 over par. A substantial part of this stock was issued during periods when federal stamp taxes on the issuance of capital stock were in effect, and on all such parts of its outstanding capital stock

¹For convenience, the word "taxpayer" will be used to refer to both the Kentucky and Delaware corporations. While the case involves the tax liability of the Kentucky corporation, the Delaware corporation was substituted in the District Court as party plaintiff. (R. 46-48.)

taxpayer duly paid the federal stamp taxes then in effect. (R. 50.)

In April, 1940, taxpayer's articles of incorporation were amended to provide for changing the capital stock from par value to no par value shares. An even exchange was effected with the par value shareholders, 3,772,763.0564 shares of no par value stock being issued and exchanged for the 3,772,763.0564 shares of the \$100 par value stock then outstanding. No new money was paid in and no property was transferred to taxpayer in connection with this issuance and exchange of stock. (R. 50-51.)

Prior to the exchange of stock taxpayer's balance sheet for March 31, 1940, showed its stock account as follows (R. 61):

Stock	
751. Capital Stock	\$377,276,305.64
753. Premium on Capital Stock	6,304,845.00
<hr/>	
Total Stock	\$383,581,150.64

Prior to the exchange of stock, taxpayer's stock account was also shown in identical form in its annual report to the Interstate Commerce Commission, except that the figures in cents were not shown. (R. 62.)

The Subaccount 751, entitled "Capital Stock", represented the total par value of taxpayer's capital stock. (R. 62.) The Subaccount 753, entitled "Premium on Capital Stock", represented the excess over par received by taxpayer upon the issuance of 210,157

shares of its capital stock under the following circumstances (R. 62-64):

In 1909 certain bonds were issued by taxpayer which gave the holders thereof the privilege of converting their bonds into paid-up shares of taxpayer's common stock at the rate of \$130 par value of bonds for each \$100 par value of stock, on or before June 1, 1919. Up to January 9, 1912, \$662,090 par value of such bonds were surrendered and taxpayer issued in place thereof 5,093 shares of its \$100 par value capital stock. The par value of the stock was entered in the "Capital Stock" Subaccount and the excess of the par value of the bonds over the par value of the stock, namely, \$152,790, was entered in the "Premium on Capital Stock" Subaccount. There was no law taxing the original issue of certificates of stock when this conversion was made, so that no tax was payable on the original issue of these 5,093 shares.

In 1919 bonds of a par value of \$26,657,150 were turned in and taxpayer issued in place thereof 205,055 shares of its capital stock, each share having a par value of \$100. The par value of the stock was entered in the "Capital Stock" Subaccount and the excess of the par value of the bonds over the par value of the stock, namely, \$6,151,650, was credited to the "Premium on Capital Stock" Subaccount. In accordance with law, revenue stamps at the rate of five cents on each \$100 of par value of the 205,055 shares of \$100 par value stock were purchased by taxpayer and attached to the stock books.

In 1929 taxpayer issued certain bonds which had warrants attached thereto entitling the owners thereof to purchase on or before May 1, 1934, three shares of taxpayer's \$100 par value of stock at \$145 a share, plus adjustment of accrued dividends. A total of nine shares of taxpayer's stock was purchased pursuant to this arrangement in 1930 for a total price of \$1,305. The par value of the stock was entered in the "Capital Stock" Subaccount and the excess of \$405 over par was credited to the "Premium on Capital Stock" Subaccount. The correct amount of federal revenue stamps applicable to the original issue of these nine shares was affixed to the stock books of taxpayer at the time these nine shares were issued.

After the exchange of no par value stock for the \$100 par value stock in 1940, taxpayer's stock account, as shown in its balance sheet for April 30, 1940, was carried as follows (R. 64):

Stock	
751. Capital Stock	\$383,581,150.64
753. Premium on Capital Stock
<hr/>	
Total Stock	\$383,581,150.64

Taxpayer's stock account, subsequent to the exchange, was also shown in identical form in its annual report to the Interstate Commerce Commission for 1940, except that the figures in cents were not shown. Thus, the "Premium on Capital Stock" total of \$6,304,845 was transferred and added to the "Capital Stock"

account of \$377,276,305.64, making the "Capital Stock" account total of \$383,581,150.64. (R. 64-65.)

No original issue tax was ever paid with respect to the amount of \$6,304,845 transferred from "Premium on Capital Stock" account to the "Capital Stock" account other than that which taxpayer seeks to recover in this action. (R. 65.)

The Commissioner of Internal Revenue, by letter dated July 15, 1942, addressed to Internal Revenue Agent R. C. Cannedy at Los Angeles, California, ruled that, as the result of the change of taxpayer's stock from \$100 par value shares to no par value shares, the original issue stamp tax became due under Section 1802(a) of the Internal Revenue Code. It was held by the Commissioner that, by reason of the transfer of the \$6,304,845 from Subaccount 753, "Premium on Capital Stock," to Subaccount 751, "Capital Stock," additional capital in that amount was dedicated to the capital account; that this amount represented capital with respect to which no previous issue stamp tax had ever been paid; and that the tax was due with respect to the full amount of \$383,581,150.64 in taxpayer's "Capital Stock" Subaccount 751 because "the new capital and the old capital were intermingled in such a way that it cannot be said that the increase in the Capital Stock Account can be allocated to specific shares." Demand was made upon taxpayer for payment of the issue stamp tax with respect to the entire amount in "Capital Stock" Subaccount 751 following the change to no par shares. Taxpayer subse-

quently paid the tax in the amount of \$46,687.95 to appellee under protest, filed a claim for refund which was rejected, and instituted suit for refund in the District Court. (R. 65-67.)

The District Court held that taxpayer incurred original issue stamp tax in the amount of \$46,687.95 under Section 1802 of the Internal Revenue Code and denied recovery to taxpayer. (R. 72-77; 79-80.) The District Court's findings of fact include the following (R. 78-79):

5. At the time of and in connection with the exchange of the stock the plaintiff added the amount of \$6,304,845 to the capital stock account and thereby increased it to \$383,581,150.64.

6. The amount of \$6,304,845 was additional capital and no original issue tax was ever paid with respect to that amount.

7. When the amount of \$6,304,845 was transferred to the capital stock account and the new shares were issued, there was no allocation of specific shares to such transferred amount, each share represented both old and new capital and the new capital was so intermingled with the old capital that it is impossible to identify any part thereof with any of the new shares.

SUMMARY OF ARGUMENT.

The documentary stamp tax imposed by Sections 1800 and 1802(a) of the Internal Revenue Code is on shares of stock constituting an original issue. An

original issue includes shares issued in exchange for other shares, as here, if the exchange is accompanied by an increase in capital, that is, of capital as distinguished from surplus. In the present case taxpayer issued no par value shares in exchange for \$100 par value shares and transferred \$6,304,845 from its "Premium on Capital Stock" account to "Capital Stock" account. Prior to its transfer, the \$6,304,845 constituted paid-in surplus available for dividends. Thus, its transfer to "Capital Stock" account on issuance of the no par value shares in exchange for par value shares resulted in an increase in capital and an original issue of stock subject to tax under Sections 1800 and 1802(a).

Taxpayer's arguments in avoidance of the tax are all without merit. The pertinent Treasury Regulations support rather than refute the conclusion that taxpayer is liable for the tax. Although taxpayer asserts the contrary, its action in transferring the \$6,304,845 of paid-in surplus to "Capital Stock" account was effectual and binding on taxpayer under Kentucky law. Similarly, taxpayer is not relieved from the tax because it might not have made the transfer to "Capital Stock" account had not the rules of the Interstate Commerce Commission required it. Taxpayer's liability for tax is based on what it did, not on what it might have done, and the fact that the transfer was made in compliance with rules of the Interstate Commerce Commission does not change the realities of what taxpayer did.

ARGUMENT.

THE EXCHANGE OF TAXPAYER'S \$100 PAR VALUE STOCK FOR NO PAR VALUE STOCK, ACCOMPANIED BY A TRANSFER OF \$6,304,845 FROM "PREMIUM ON CAPITAL STOCK" ACCOUNT TO "CAPITAL STOCK" ACCOUNT, WAS AN ORIGINAL ISSUE OF SHARES OF STOCK AND SUBJECT TO TAX UNDER SECTIONS 1800 AND 1802(a) OF THE INTERNAL REVENUE CODE.

Under Sections 1800 and 1802(a) of the Internal Revenue Code (*supra*), documentary stamp tax is imposed "On each original issue, whether on organization or reorganization, of shares or certificates of stock, * * * by any corporation * * *." If the capital of a corporation is increased upon an issuance of stock, the stock constitutes an "original issue" and this is true even though the new stock may merely be exchanged for previously issued stock. *Rio Grande Oil Co. v. Welch*, 101 F. 2d 454 (C.A. 9th); *W. T. Grant Co. v. Duggan*, 94 F. 2d 859 (C.A. 2d); *American Gas & Electric Co. v. United States*, 69 F. Supp. 614 (S.D. N.Y.); *Ohio State Life Ins. Co. v. Busey*, 56 F. Supp. 410 (S.D. Ohio); cf. Treasury Regulations 71 (1941 ed.), Section 113.25(f), *supra*. An increase in capital means an increase in capital in the narrow sense in which the word "capital" is distinguished from "surplus". *Ibid*. The tax is on the certificates of stock measured by the value of the certificates and not on the amount of the increase in capital. *American Gas & Electric Co. v. United States*, *supra*. Accordingly, an entire new issue is taxable unless definite shares can be identified as having been issued against the increase in capital. *Rio Grande Oil Co. v. Welch*, *supra*; *W. T. Grant Co. v. Duggan*, *supra*;

American Gas & Electric Co. v. United States, supra. On the other hand, the issuance of new certificates of stock in exchange for previously issued shares may result in only a "reissue", nontaxable under Section 1802(a), if the issue is not accompanied by any increase in capital.²

In the present case no par value shares of stock were issued by taxpayer in 1940 in place of shares having a par value of \$100 a share and the issuance of the no par value shares was accompanied by a transfer of \$6,304,845 from "Premium on Capital Stock" account to "Capital Stock" account. Taxpayer's contention, which we submit is without merit, is that the transfer of the \$6,304,845 from "Premium on Capital Stock" account to "Capital Stock" account did not result in an increase in capital and that consequently, the no par value shares were a "reissue" rather than an "original issue".

The transfer of the \$6,304,845 from "Premium on Capital Stock" account to "Capital Stock" account was, however, an increase in and dedication of capital. The net worth of a corporation is divided for book-keeping purposes into two parts, capital and surplus.

²*Edwards v. Wabash Ry. Co.*, 264 Fed. 610 (C.A. 2d); *American Laundry Machinery Co. v. Dean*, 292 Fed. 620 (S.D. Ohio); *Trumbull Steel Co. v. Routzahn*, 292 Fed. 1009 (N.D. Ohio); *West Virginia Pulp & Paper Co. v. Bowers*, 293 Fed. 144 (S.D. N.Y.), affirmed per curiam, 297 Fed. 225 (C.A. 2d), certiorari denied, 265 U. S. 584; *Standard Mfg. Co. v. Heiner*, 300 Fed. 252 (W.D. Pa.); *Goodyear Tire & Rubber Co. v. United States*, 60 C. Cls. 448; *Cuba R. Co. v. United States*, 60 C. Cls. 272; *In re Grant-Lees Gear Co.*, 1 F. 2d 393 (N.D. Ohio); *Cleveland Provision Co. v. Weiss*, 4 F. 2d 408 (N.D. Ohio); *United States v. Pure Oil Co.*, 135 F. 2d 578 (C.A. 7th).

The amount placed in capital must be equal to the aggregate par value of all issued shares of par value stock, while the remainder is surplus. Grange, Corporation Law for Officers and Directors (1935), p. 243. Stated another way, "surplus" is the excess in the value of assets treated by the corporation as part of its *permanent* capital. *Peake v. Thomas*, 222 Ky. 405, 407. The excess over par received as a premium on the sale of stock constitutes "paid-in surplus" and is properly credited to a "Paid-in Surplus" account or "Capital Stock Premium" account. Graham and Katz, Accounting in Law Practice (2d ed., 1938), p. 135; Grange, *supra*, pp. 243-244; Paton, Accountants' Handbook (2d ed., 1937), p. 963. This is true in Kentucky, for the Supreme Court of Kentucky stated in *Lewis, Secretary of State v. Oscar C. Wright Co.*, 234 Ky. 814, 816, that:

* * * our corporation laws do not expressly provide for the sale of par stock at a price above par so as to create a paid-in surplus; yet that practice has been indulged in for many years, and has been recognized as a proper and safe method of financing a corporation. * * *

In the instant case, taxpayer, a Kentucky corporation at the time, received \$6,304,845 in excess of par on the sale of stock and this amount was properly carried in a "Premium on Capital Stock" account prior to the issuance of no par value stock. It constituted paid-in surplus which, in the absence of explicit statutory restrictions, is very widely assumed in practice to be available for the payment of dividends. Graham and

Katz, *supra*, p. 152; Grange, *supra*, p. 244; Mitchell, Capitalization of Corporations Issuing Shares Without Par Value, 11 A.B.A.J. 377, 380 (1925). Under the statutes of Kentucky, paid-in surplus may be used for dividends and taxpayer makes no contention to the contrary.³ In contrast, the \$100 par value of taxpayer's outstanding stock was carried in "Capital Stock" account, in the aggregate amount of \$377,276,-305.64. This was taxpayer's capital—the amount which was legally segregated or fixed in the corporate business so that it could not be withdrawn for distribution

³As taxpayer states (Br. 26-27), the only prohibition against the declaration and payment of dividends under Kentucky corporation law is that set forth in Section 548 of the Kentucky statutes (Carroll's Kentucky Statutes Annotated (Baldwin's 1936 rev.), c. 32), now Section 271.265 of the Kentucky Revised Statutes (1948), which prohibits the declaration and payment of a dividend the payment of which would render the corporation insolvent "or which would diminish the amount of its capital stock". In *Haggard v. Lexington Utilities Co.*, 260 Ky. 261, 268, it was stated that:

Section 548 does not prohibit the payment of dividends out of surplus or any other fund when such payment will not render the corporation insolvent or diminish the amount of its capital stock. * * *

That case also makes it clear that the prohibition against diminution of the amount of capital stock has reference to capital stock account only, not to capital stock account together with paid-in surplus. There the capital stock of the corporation had become impaired to the extent of approximately \$1,700,000 by reason of losses sustained on an investment. Because of Section 548 of the Kentucky statutes, no dividend could be paid although the corporation's earnings were sufficient for that purpose. To meet this situation an amendment to the articles of incorporation was adopted to reduce the capital stock of the corporation. The reduction of the capital stock of course resulted in the creation of paid-in surplus, which includes surplus arising from a recapitalization. Paton, *supra*, p. 931. It was held that the amendment to the articles of incorporation was properly adopted and that dividends could properly be paid after the reduction of capital stock "out of surplus or any other fund" (p. 268), there then being no impairment of capital stock.

to stockholders. Grange, *supra*, pp. 112, 113. Thus, when taxpayer in 1940 issued no par value stock in place of stock having a par value of \$100 a share and transferred the \$6,304,845 of paid-in surplus (carried in the "Premium on Capital Stock" account) to "Capital Stock" account, there was an increase in capital and, accordingly, the no par value shares constituted an "original issue" taxable under Section 1802(a).

While the account or accounts carried by taxpayer on its books under the heading of "Surplus Account" were not affected by the issuance of the no par value stock in 1940, taxpayer's repeated assertions that the issuance of the stock did not change its surplus account (Br. 16-17, 26) must be considered in connection with the nature of the "Premium on Capital Stock" account. Since that account was actually a paid-in surplus account, as we have shown, and the amount thereof, \$6,304,845, was transferred to the "Capital Stock" account upon issuance of the no par value shares, the transfer of the \$6,304,845 to the "Capital Stock" account was in fact a transfer of surplus to capital.

Contrary to an argument made by taxpayer (Br. 27-35), the no par value stock issue was not exempt from tax under Treasury Regulations 71 (1932 ed.), Article 29(i). That regulation gives the following as an example of an issue of stock not subject to tax:

- (i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected

without the capital of the corporation being increased, either by transfer of surplus to capital account or otherwise.

Treasury Regulations 71 (1941 ed.), which superseded Treasury Regulations 71 (1932 ed.), state the same example in Section 113.25 (f) as follows:

(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer or earned surplus or otherwise.

Taxpayer's contention is that these provisions should be interpreted as exempting from tax an issue of stock where the only increase in capital results from a transfer of *paid-in* surplus to capital stock account—that the tax is to be imposed only where there is a transfer of *earned* surplus to capital stock account. (Br. 28, 31-33.) The emphasis in the Regulations, however, is on the absence of an increase in capital *by any method whatever*. That the Regulations were not intended to exempt from tax an issue which is accompanied by an increase in capital by way of a transfer of paid-in surplus to capital stock account is evident from the fact that Treasury Regulations 71 (1932 ed.), Article 28 (e), and Treasury Regulations 71 (1941 ed.), Section 113.24(d), *supra*, respectively, cite "Stock dividend" and "Stock issued as a dividend" as an example of an issue which *is* subject to tax. On the issuance of a stock dividend there is necessarily an increase in capital (*Eisner v. Macomber*, 252 U.S. 189, 210-211) and in most states a stock

dividend may be issued against paid-in surplus. When it is, the stock issue is an original issue, obviously, and taxable under the Regulations. Thus, so long as no shares have been issued against paid-in surplus, the issuance of new shares against it, whether as a stock dividend attributable to specific shares or as an entire new issue against which the old capital and new capital, consisting of paid-in surplus, are commingled, the stock is an original issue and nothing in the Regulations precludes that conclusion. This Court so assumed in *Rio Grande Oil Co. v. Welch*, 101 F. 2d 454. In that case, where a stock issue was held to be an original issue and taxable under an identical predecessor of Section 1802 (a), there was no transfer of earned surplus; the "Value of Capital Stock Outstanding" account was simply increased by unrealized appreciation on certain assets, plus paid-in surplus.

Taxpayer is in error in urging (Br. 18-19) that the \$6,304,845 of paid-in surplus it transferred from "Premium on Capital Stock" account to "Capital Stock" account was tax-free, as having been received as a premium upon the sale of stock, and thus should not be considered as an increase in capital upon its transfer to "Capital Stock" account in 1940. It is true of course that tax was either paid or was not required to be paid on the \$100 par value certificates from the sale of which taxpayer realized the \$6,304,845 in excess of par value, but it does not follow that Congress intended the \$6,304,845 to be tax-free. Such tax as was paid upon the certificates from which taxpayer realized the aggregate premium of \$6,304,845

was paid upon the certificates on the basis of taxpayer's capital stock account as of that time, which included only the par value of the certificates. The later increase in capital by the transfer of the \$6,304,845 of paid-in surplus to "Capital Stock" account was of capital which had not been subjected to the issue tax and against which new shares could have been issued as a dividend. The increase in capital resulted in another original issue of stock and thus necessarily in tax liability under Section 1802 (a).⁴

There is also no merit in the argument of taxpayer (Br. 20-27) based upon Kentucky statutes. Taxpayer assumes that the transfer of the \$6,304,845 of paid-in surplus to "Capital Stock" account was an increase of "capital stock" within the meaning of Sections 553 and 564-1 of the Kentucky statutes (Carroll's Kentucky Statutes Annotated (Baldwin's 1936 rev.), c. 32); interprets both of these sections as requiring the filing of a statement or amendment to taxpayer's articles of incorporation as to the transfer of the \$6,304,845 to "Capital Stock" account; and argues that, since it filed no such statement or amendment, the

⁴Taxpayer places mistaken reliance upon a Bureau letter (Br. 33-34) stating that no tax was incurred on an exchange of stock accompanied by a transfer of \$94,658 from capital surplus account to capital stock account. The reason for that statement, as taxpayer's quotation of the letter shows, was that the amount of capital surplus involved had previously been a part of the capital stock account, subjected to the issue tax, created as capital surplus by a reduction in the capital stock account, and then, upon the stock issue in question, transferred back to the capital stock account. The present case involves no such set of facts.

The Treasury Regulations relating to income taxation upon which taxpayer relies (Br. 30-31) are also inapposite on their face.

transfer was ineffectual to increase its "Capital Stock" account. (Br. 24.) Section 553, but not Section 564-1 (see Br. 23-24), requires the filing of a statement as to an increase in capital stock. The failure to file the statement required by Section 553, which is to be filed "in the same manner as articles of incorporation," does not render an increase or decrease in capital stock void; the required statement is merely "for the benefit of the public; to protect the rights of creditors or those of the public dealing with the corporation." *Williams v. Davis*, 297 Ky. 626, 630. Moreover, it would appear that taxpayer's transfer of the \$6,304,845 to "Capital Stock" account was not an increase in "capital stock" within the meaning of Sections 553 and 564-1 of the Kentucky statutes and that, therefore, those sections are inapplicable with respect to the transfer. An increase in "capital stock" under those sections appears to mean an increase in the total *par value* of the authorized number of shares of stock. See *Haggard v. Lexington Utilities Co.*, 260 Ky. 261. The issuance of *no par value* shares is covered by Section 564-2 (Carroll's Kentucky Statutes Annotated, *supra*), which provides, *inter alia*, as follows:⁵

§ 564-2. *Stock without par value.*—Any corporation organized under this law may, if so provided in its certificate of incorporation or in an amendment thereof, issue shares of stock * * * without any nominal par value. * * * Such stock

⁵This statute as quoted on page 4 of the appendix to taxpayer's brief is inaccurate in that it omits the phrase "for such consideration as may be fixed from time to time."

may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the board of directors thereof, pursuant to authority conferred in the certificate of incorporation, or if such certificate shall not so provide, then by the consent of the holders of two-thirds of each class of stock then outstanding and entitled to vote given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws * * *.

Thus, no par value shares may be issued in place of par value shares only pursuant to amendment of the articles of incorporation, but the amount of the consideration received therefor, and thus the amount of capital placed in capital stock account, is strictly a matter within the discretion of the board of directors under proper authority from the stockholders. This discretion extends to a determination of what shall be capital and what paid-in surplus, for in *Lewis, Secretary of State v. Oscar C. Wright Co.*, 234 Ky. 814, it was held that, despite the absence of express statutory authority, the board of directors, which had the consent of the stockholders, could in their discretion allocate to paid-in surplus rather than to capital a portion of the consideration received for no par value shares, just as paid-in surplus may be created by a sale of par value stock above par. In the present case there was an increase in capital upon the exchange of the \$100 par value shares for no par value shares, but not an increase in authorized capital stock. An increase in capital, but not an increase in authorized capital stock, would also have resulted if taxpayer had declared a stock dividend based on a

transfer of the \$6,304,845 of paid-in surplus to "Capital Stock" account, but taxpayer would hardly contend that a statement of the transfer to "Capital Stock" account or an amendment of its articles of incorporation would be necessary to declare a stock dividend which would not increase its outstanding shares beyond its authorized capital stock.

Since the filing of a statement or amendment to taxpayer's articles of incorporation was not necessary to make effectual taxpayer's transfer of the \$6,304,845 of paid-in surplus to "Capital Stock" account either under Sections 553 and 564-1 of the Kentucky statutes, relied upon by taxpayer, or Section 564-2, *supra*, the transfer was valid and binding on taxpayer. The only other requirement under any of these statutes was that the transfer be made under authority conferred by stockholders representing two-thirds of the capital stock, after notice and a meeting for that purpose. Taxpayer's board of directors adopted a resolution providing, among other things, for a change in authorized capital stock from \$100 par value shares to no par value shares and the exchange of stock share for share (R. 56-58) "subject to the consent of the stockholders *and to authorization by the Interstate Commerce Commission,*" (italics supplied) (R. 56); for notice of and a meeting of the stockholders "for the purpose, among others, of voting upon the said amendment and the said change in capital stock *and authorizing action incidental thereto*" (italics supplied) (R. 57); and for application to the Interstate Commerce Commission for authority to cause to be issued in exchange for its par value common,

stock then outstanding 3,772,763.0564 shares of stock without nominal par value (R. 58). At the meeting of the stockholders duly called pursuant to this resolution of the board of directors, the stockholders passed a resolution stating, among other things, that (R. 60-61):

* * * the proper officers of the Company are authorized to take or cause to be taken all such action as may be necessary or required by law to make effective the said amendment changing the capital stock of this Company.

That the Board of Directors and proper officers of this Company are hereby authorized and empowered to take any and all action necessary or appropriate to carry out the effect and intent of said amendment and the issuance or substitution of stock as therein authorized, * * *

As taxpayer states (Br. 35-36), under the requirements of the Interstate Commerce Commission it was mandatory upon taxpayer, in changing its capital stock to no par value shares and exchanging such shares for the outstanding par value shares, to transfer the \$6,304,845 of paid-in surplus from "Premium on Capital Stock" account to "Capital Stock" account. In obtaining the authority of the Interstate Commerce Commission to the change, taxpayer recognized and apparently proposed the transfer of the \$6,304,845 to "Capital Stock" account, for the report of the Interstate Commerce Commission states (R. 68-69):

The applicant proposes to amend its articles of incorporation to change its authorized capital stock from shares with a par value of \$100 a

share to shares without nominal or par value, the number of authorized shares to remain unchanged. Of the total authorized shares, 3,722,763.0564 will be issued to the holders of the outstanding stock, upon the surrender of the outstanding certificates, on a share for share basis and will be entered in the applicant's capital stock account at \$383,581,150.64, representing the par value and premium on its outstanding stock. * * *

Hence, taxpayer's action in transferring the \$6,304,845 of paid-in surplus to "Capital Stock" account was both intentional and authorized by the stockholders as being necessary, appropriate, and required by law to make effective the amendment changing taxpayer's capital stock and for exchange of no par value shares for the outstanding \$100 par value shares. The transfer of the \$6,304,845 to "Capital Stock" account was therefore valid and binding on taxpayer.

The issue tax cannot be avoided by taxpayer on the ground that the transfer of the \$6,304,845 of paid-in surplus to "Capital Stock" account was made in compliance with rules of the Interstate Commerce Commission. As the District Court stated (R. 77), the fact that the transfer may have been required by the Interstate Commerce Commission "does not change the realities of the situation." Contrary to taxpayer's assertions (Br. 37-39), the transfer did not merely effect a change in description of nomenclature of the paid-in surplus previously carried in the "Premium on Capital Stock" account. As we have already shown, taxpayer intended to and, in conformance with the laws of Kentucky, did legally increase its "Capital Stock" account by the \$6,304,845 of paid-in surplus.

Accordingly, taxpayer is not relieved from tax liability simply because it *might not* have transferred the \$6,304,845 to "Capital Stock" account had it not been for the rules of the Interstate Commerce Commission. That conclusion is not in conflict with the statement in *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 562, that the Commissioner may not resort to accounting rules of the Interstate Commerce Commission for the determination of tax liability. Taxpayer's liability for the issue tax is based not upon mere book entries made under rules of the Interstate Commerce Commission but upon the substantive and legal effect of what taxpayer did.

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Dated, March 16, 1949.

Respectfully submitted,

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No. 12118

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK W. BABCOCK,

Appellant,

vs.

BEN C. KOEPKE, individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, et al.,

Appellees.

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

FEB 12 1949

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Affidavit of Dorothy Burtch.....	49
Affidavit of Marion Clark.....	47
Affidavit of Joan Engelhardt.....	44
Affidavit of Robert D. Fisher.....	112
Exhibit A—Navy College Contract, September 15, 1943, Contract NOP 187, Between the United States and the University of Southern California..	113
Exhibit B—Supplement No. 3, Dated as of July 1, 1944, to Contract NOP 187, Between the United States and the University of Southern California..	115
Affidavit of Ivy Gray.....	52
Affidavit of B. C. Koepke in Support of Motion to Dismiss	25
Affidavit of Helen Hall Moreland.....	116
Exhibit A—Copy of the Form of Application for Housing in University Residence Hall.....	118
Exhibit B—Copy of Residence Standards of the As- sociated Women Students.....	120
Affidavit of N. M. Saunders.....	130
Affidavit of Hugh C. Willett.....	53
Exhibit A—Photostatic Copy of Certain Pages From the "Circular of Information," Published by the University of Southern California for Use During the Scholastic Year 1944-1945.....	55

	Page
Exhibit B—Photostatic Copy of Certain Pages From the “Circular of Information,” Published by the University of Southern California, for Use During the Scholastic Year 1945-1946.....	74
Exhibit C—Photostatic Copy of Certain Pages From the “Circular of Information,” Published by the University of Southern California, for Use During the Scholastic Year 1946-1947.....	89
Exhibit D—Photostatic Copy of the Form of Appli- cation for Admission Used by Students During the Scholastic Year, 1945-1946.....	108
Exhibit E—Copy of the Form of Registration Per- mit Now Used by the University of Southern California	111
Affidavit of Tighe E. Woods in Support of Motion to Dismiss	26
Affidavit of Austin Clapp for and Order Granting Continuance of Hearing on Motion to Dismiss, Filed October 8, 1948.....	27
Affidavit of Austin Clapp for and Order Granting Continuance of Hearing on Motion to Dismiss, Filed October 15, 1948.....	30
Appeal:	
Notice of	142
Statement of Points on (Court of Appeals).....	147
Certificate of Clerk.....	143
Complaint and Points and Authorities.....	6
Findings of Fact and Conclusions of Law.....	135
Minute Order Entered November 22, 1948.....	134
Motion of Ben C. Koepke to Dismiss Complaint.....	23

	Page
Motion for Preliminary Injunction.....	128
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	142
Order Continuing Motion for Injunction Pending Appeal, and Extending Stay Order (Court of Appeals)	146
Order Denying Motion for Preliminary Injunction.....	139
Order Enjoining Further Proceedings in State Court....	22
Order Granting Continuance of Hearing on Motion to Dismiss, Filed October 8, 1948.....	29
Order Enjoining Appellee, Upon Appellant's Depositing Rentals (Court of Appeals).....	149
Order Granting Continuance of Hearing on Motion to Dismiss, Filed October 15, 1948.....	32
Order Granting Motion to Dismiss.....	141
Order to Show Cause and Temporary Restraining Order	20
Order Staying Proceedings (Court of Appeals).....	145
Petition for Removal.....	3
Points and Authorities.....	16
Reply to Plaintiffs' Request for Admissions.....	43
Request for Admissions, Plaintiff's.....	32
Order Rejecting Decontrol Application.....	35
Opinion and Order Affirming Determination of Rent Director	37
Opinion and Order Vacating Orders and Dismissing Appeal	40
Statement of Points on Appeal (Court of Appeals)....	147

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In the District Court of the United States

Southern District of California

Central Division

No. 8678-Y

FRANK W. BABCOCK,

Plaintiff,

vs.

BEN C. KOEPKE, MELVIN G. KING, JAMES F. KING, A. VANCA, C. GAFFNEY, N. J. PATTERSON, W. R. WILKINS, GERTRUDE SILVERSTEIN, DOROTHY HAYLANSKI, JOHN W. CASTLE, RICHARD NUGENT, BYRON LONG, ROBERT H. KENT, EUNICE E. KENT, ELEANOR CHESAREK, WILLIAM ROBINSON, TOM STILLWELL, S. D. TAYLOR, BEA TAYLOR, OLGA SCHMEL, BARBARA NEGLEY, CLAIRE PRATER, LULA MAE STEWART, ELLEN VAN GOETHEM, LORRAINE FARLOWE, R. B. MILLER, MRS. R. B. MILLER, MAX TAYLOR, DAVID ALLEN, LAURA FOLAN, FRANK T. FOLAN, JOAN ENGELHART, JEWEL ELY, ELIZABETH WALKER, LESLIE ELY, F. R. CHENEY, MRS. F. R. CHENEY, SOL SELTZER, SAM LAZERWITZ, GLENNA WALLACE, DOROTHY DUNKER, MARION CLARK, DOROTHY BURTCH, LAMBERT BAYHI, L. A. OHLGREN, THERESA SPUNZO, JUNE CARLSON, W. MARSDEN, P. SMITH, ANDREW J. STARR, JOHN DOE, JANE DOE, RICHARD ROE and SALLY ROE.

Defendants.

PETITION OF B. C. KOEPKE, AREA RENT DIRECTOR, ON BEHALF OF THE UNITED STATES OF AMERICA FOR REMOVAL OF SUIT FROM THE STATE COURT

The petition of the defendant B. C. Koepke (sued herein as Ben C. Koepke) respectfully shows:

1. That certain case entitled Frank W. Babcock, plaintiff, against Ben C. Koepke, et al., defendants, bearing Superior Court Case Number 549,890, was filed in the Superior Court of the State of California, in and for the County of Los Angeles on September 16, 1948 and is now pending therein. A copy [2] of the complaint and summons were lodged with the office of this defendant on September 17, 1948.

2. Said action is a suit of a civil nature at law and equity and for declaratory relief of which the District Courts of the United States have original jurisdiction in that the suit is for an injunction to restrain the execution and enforcement of the Housing and Rent Act of 1947 and of regulations and orders issued pursuant thereto and for declaratory relief of rights and duties arising under said statute and regulations and said action arises under the Constitution and laws of the United States and presents a federal question of the interpretation of a solely for the purpose of removing said cause and hereby petitions to remove said cause to the United States District Court for the Southern District of California, Central Division, upon the ground and for the reason that said cause arises under the Constitution and laws of the United States and involves a federal question and therefore is a cause of which the District Court has original jurisdiction.

4. That the time for defendant in this action to move, answer or plead to the complaint in this action has not

expired and will not expire until after September 27, 1948 and your petitioner has not yet filed any pleading nor in any way appeared therein.

5. That defendant is sued herein solely on account of matters allegedly done or to be done in his capacity as Director of the Los Angeles Defense Rental Area Office of the Office of the Housing Expediter, namely, in his capacity as an officer of the United States, as shown by the complaint herein. That the United States is the real party in interest and this petition is filed on behalf of the United States. For these reasons the defendant is not obligated to and does not file a bond.

6. That the undersigned, B. C. Koepke, sued herein as Ben C. Koepke, as Area Rent Director of the Los Angeles Defense Rental Area Office, Office of the Housing Expediter, is connected with the matters related in the complaint solely by reason of his office as Area Rent Director. [3]

7. It appears on the face of the complaint, and petitioner is informed and believes and therefore alleges that in this suit the amount in dispute exceeds the sum of \$3,000.00 exclusive of interest and cost in that (a) the amount for which plaintiff is renting the premises in question as alleged in the complaint exceeds in the amount of \$1600.00 each month the sum which plaintiff alleges the Area Rent Director will fix or claims to be the maximum rent, and during the probable existence of rent control or under the terms of any retroactive order which this defendant may issue effective as of July 1, 1947, the difference between the rent which the plaintiff is now collecting and which he will legally be entitled to collect will be well in excess of the sum of \$3,000.00 exclusive of interest and cost; and (b) in that the premises involved in this suit consist of thirty units on which the

plaintiff allegedly has spent in remodeling, rehabilitation and conversion the sum of \$39,000.00 and therefore said premises are worth greatly in excess of \$3,000.00 exclusive of interest and cost.

That any orders which the Area Rent Director may issue may be made retroactive to July 1, 1947. That pursuant to the provisions of Section 205 of the Housing and Rent Act of 1947 as amended, overcharged tenants may sue for treble the amount of over charges or \$50.00, whichever is greater, plus reasonable attorney's fees and costs.

Wherefore, plaintiff prays that this Court make an order of removal and entertain this case, order that no bond be required, and cause the record in said Superior Court to be removed into the District Court of the United States for the Southern District of California, Central Division.

There is attached hereto a copy of all pleadings and papers filed in said case in said Superior Court.

Dated: Los Angeles, California, this 21st day of September, 1948.

B. C. KOEPKE

Sued Herein as Ben C. Koepke, Petitioner, on Behalf of
the United States of America.

ABE I. LEVY

STEPHEN D. MONAHAN

FRANK L. HIRST

RICHARD G. SOLOF

BENJAMIN CHAPMAN

By Benjamin Chapman

Attorneys for Defendant Ben C. Koepke [4]

[Verified.]

[Endorsed]: Filed Sep. 21, 1948. Edmund L. Smith,
Clerk. [5]

In the Superior Court of the State of California in and for the County of Los Angeles

Frank W. Babcock, Plaintiff, vs. Ben C. Koepke, Melvin G. King, James F. King, A. Vanga, C. Gaffney, N. J. Patterson, W. R. Wilkins, Gertrude Silverstein, Dorothy Haylanski, John W. Castle, Richard Nugent, Byron Long, Robert H. Kent, Eunice E. Kent, Eleanor Chesarek, William Robinson, Tom Stillwell, S. D. Taylor, Bea Taylor, Olga Schmel, Barbara Negley, Claire Prater, Lula Mae Stewart, Eilen Van Goethem, Lorraine Farlowe, R. B. Miller, Mrs. R. B. Miller, Max Taylor, David Allen, Laura Folan, Frank T. Folan, Joan Engelhardt, Jewell Ely, Elizabeth Walker, Leslie Ely, F. R. Cheney, Mrs. F. R. Cheney, Sol Seltzer, Sam Lazerwitz, Glenna Wallace, Dorothy Dunker, Marion Clark, Dorothy Burtch, Lambert Bayhi, L. A. Ohlgren, Theresa Spunzo, June Carlson, W. Warsden, P. Smith, Andrew J. Starr, John Doe, Jane Doe, Richard Roe and Sally Roe, Defendants. No. 549890.

COMPLAINT

(For Declaratory Relief and Injunction) and
POINTS AND AUTHORITIES

Plaintiff complains of defendants and for cause of action alleges as follows: [6]

I.

Since June, 1947 plaintiff has been and now is the owner of the real property described as:

Lot 10, Block A, West Los Angeles Tract in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 3, at page 142 of Miscellaneous Records in the office of the County Recorder of said County and State, also

known as 660 W. Jefferson, Los Angeles, California, and of the buildings and structures thereon.

II.

Defendant Koepke is the duly appointed, qualified and acting Area Rent Director for the Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, an agency of the United States, and has been since July 1, 1947 and now is administering the Housing and Rent Act of 1947, both as originally enacted and as amended, and the Rent Regulation for Controlled Housing (12 F. R. 4331) pursuant to a delegation of authority so to do issued by Tighe E. Woods, the Housing Expediter. The real property described in paragraph I is within the territorial limits of the Los Angeles Defense-Rental Area.

III.

During the period February 1, 1945 to January 31, 1947, both dates inclusive said premises were not rented as housing accommodations.

From prior to February 1, 1945 to sometime in June, 1946 said premises were occupied from time to time by members of the United States Marine Corps under a written contract between the United States Navy and the University of Southern California providing for the education, training and housing of Naval personnel. The whole intention, object and purpose of said contract was to accomplish the education and training of Naval personnel and the use and occupancy of said premises was but incidental and subordinate to that intention, object and purpose. At no time during the period said contract with the United States Navy was in effect did the relationship of [7] landlord and tenant exist between the University of Southern California and any one or more of the

Naval personnel who occupied said premises from time to time.

IV.

From June to September, 1946 said premises were unoccupied.

V.

From September, 1946 to August, 1947, said premises were occupied from time to time by women students of the University of Southern California under written contracts between the University of Southern California and said students providing for their education, training and housing. The whole intention, object and purpose of said contract was to accomplish the education and training of said students and the occupancy of said premises was but incidental and subordinate to that intention, object and purpose. At no time during the period of said contract with the University of Southern California was the relationship of landlord and tenant existent between the University of Southern California and any one or more of said women students who occupied said premises from time to time.

VI.

By September 1, 1947 said premises were surrendered by the University of Southern California to plaintiff in an unoccupied condition.

VII.

Occupancy by the Naval personnel aforesaid, and each of them, was on a barracks basis, and each of them was subject to assignment, reassignment or transfer by the officer in command, and to the rules and regulations of the Department of the Navy of the United States and of the Articles of War governing the conduct of enlisted Naval personnel.

Occupancy by the women students of the University of Southern California aforesaid, and by each of them, was on a dormitory basis and each of them was subject to assignment and reassignment, discipline and expulsion by the University of Southern California and their occupancy was subject to the residence rules for women students of the said University.

None of said occupants, either Naval personnel or women students, [8] had any right to exclusive occupancy of any room or combination of rooms in said premises nor did any of them occupy any portion of said premises as a self-contained unit consisting of living and sleeping space, bath and toilet facilities and kitchen facilities.

During July or August of 1947 plaintiff had conferred with officials of the Los Angeles Defense-Rental Area Office, of the Office of Rent Control, Office of the Housing Expediter, and advised them that he proposed to convert said premises from their existing condition, dividing the rooms into self-contained dwelling units each containing living and sleeping space, bath and toilet, and kitchen facilities, and requested that he be advised whether or not the dwelling units so created would be subject to or free from control under the housing and rent act of 1946, and plaintiff was advised by said officials that said units, so created, would be decontrolled under said Act.

VIII.

After receiving said advice, plaintiff remodeled and rehabilitated said premises, creating thirty (30) separate self-contained dwelling units.

The amount necessarily expended by plaintiff for said remodeling, rehabilitation and conversion was approximately \$39,000.00.

IX.

After the remodeling, rehabilitation and conversion was completed, any relying on the advice received from said officials, during September and October, 1947 plaintiff entered into written lease agreements with various persons, each providing for the rental by plaintiff of one of the newly created apartments to such persons.

X.

At the date of filing this complaint said premises are occupied by the defendants, other than Koepke, which defendants are hereafter referred to as the tenant defendants. Each of the tenant defendants occupies the apartment in which he is living under a written lease agreement between him or him and other tenant defendants and the plaintiff. The dates upon which said tenant defendants executed the lease agreement to which he is party, [9] the amount of rent agreed to be paid by him in such agreement, the apartment which is covered by such lease agreement and the proposed maximum rental for said apartment which will be purportedly fixed by defendant Koepke unless restrained by this Court are set forth in Exhibit A hereof which is by this reference incorporated herein and made a part hereof as though herein fully set forth.

XI.

Plaintiff contends that by reason of the foregoing facts said housing accommodations were not and are not subject to the Housing and Rent Act of 1947, as amended, at any time from and after September 1, 1947, nor to any regulation or order issued by the Housing Expediter, nor to any order issued by defendant Koepke in the exercise of his delegated authority. Defendants contend that by reason of the foregoing facts said housing accommo-

dations are subject to the Act, and to regulations or orders issued thereunder by the Housing Expediter or by defendant Koepke in the exercise of his delegated authority. [10]

XII.

On September 2, 1948, in proceedings in defendant Koepke's office, described as Docket No. 271860, said defendant issued and mailed to plaintiff notices in writing advising him that said defendant proposed to issue orders fixing maximum rents for the said apartments, and to require plaintiff to refund to the tenant defendants and to other persons who had theretofore occupied said apartments certain amounts theretofore and thereafter paid and to be paid to plaintiff by defendants other than Koepke.

XIII.

The Housing Expediter has not established any administrative procedure which will permit plaintiff to secure a declaration that said housing accommodations are not "controlled housing accommodations" within the meaning of the Housing and Rent Act of 1947, as amended, which would be binding upon the tenant defendants. Plaintiff heretofore requested an opinion from defendant Koepke relative to the status of said housing accommodations and an opinion was rendered rejecting plaintiff's contention that said accommodations were decontrolled within the meaning of said Act, as amended. Said opinion is not an order, does not bind or affect the defendant tenants, and in connection with such opinions it has been expressly directed by the Housing Expediter that there shall be no administrative review of or appeal from the same. Nevertheless, plaintiff is informed and believes, and therefore alleges, that said opinion has been expressly approved by

the Regional Rent Director of the Office of Rent Control, Office of the Housing Expediter, and is based upon a similar opinion by the Housing Expediter.

XIV.

Unless restrained and enjoined therefrom by this Court, defendant Koepke threatens to and will do the following things: [11]

(a) Issue an order or orders purportedly fixing a maximum rent or rents for the apartments in said premises;

(b) Issue an order or orders purportedly requiring plaintiff to refund to the tenant defendants and others who have been tenants of plaintiff in said premises amounts heretofore collected by plaintiff as rentals therefor; and

(c) Advise the litigation division of the Los Angeles Defense-Rental Area office that plaintiff has committed violations of the Housing and Rent Acts of 1947 and 1948 and request them to commence an action or actions against plaintiff to attempt to restrain and enjoin plaintiff from demanding or receiving from tenants in said premises any amounts in excess of those fixed by defendant Koepke's order or orders and to require plaintiff to make the refunds which said order or orders will purportedly require.

XV.

Plaintiff is informed and believes, and therefore alleges that if said order or orders are issued as proposed the tenants of said housing accommodations would refuse to pay rent in excess of the amount specified therein and it would become necessary for plaintiff to bring successive

actions at law to recover the rents to which he is and will be entitled, or to bring successive actions in unlawful detainer to evict the present tenants of said housing accommodations, or future tenants of said housing accommodations, for non-payment of rent, and in each of said actions each of said tenants would contend that said order or orders issued by defendant Koepke were valid and prevented a recovery by plaintiff in such actions.

XVI.

Plaintiff is collecting rentals from tenants of said housing accommodations at the rate of approximately \$2800.00 per month, and if said order is issued it will purport to reduce the amounts which plaintiff may lawfully charge and collect from said tenants to approximately \$1200.00 per month, and by the issuance of said order plaintiff will suffer irreparable injury. [12]

Wherefore, plaintiff prays judgment as follows:

(1) That a temporary restraining order, and preliminary and final injunction issue restraining and enjoining defendant, Koepke, his agents, servants, and employees, and all persons acting in concert with him from doing, or from attempting to do, directly or indirectly, any of the following acts:

(a) Issuing or purporting to issue the proposed or any order or orders fixing or purporting to fix a maximum rent or rents for the premises known as 660 West Jefferson, Los Angeles, California, or for any part thereof:

(b) Claiming or asserting that on September 1, 1947, or at any time since that date here was, or has

been, or is a maximum rent for the premises at 660 West Jefferson, Los Angeles, California, or for any part thereof;

(c) Taking any steps or proceeding intended to or attempting to enforce any order such as described in subparagraph (a) above, or to enforce any claim or assertion such as is described in subparagraph (b) above;

(2) That an order to Show Cause issue ordering defendant Koepke to show cause, if any he has, at a date, place and time fixed by the Court, why a preliminary injunction should not issue against him restraining him during the pendency of this action from doing any of the acts specified in (1) above;

(3) That this Court declare the respective rights and duties of the parties hereto under the Housing and Rent Acts of 1947 and 1948 with respect to the premises known as 660 West Jefferson, Los Angeles, California, and the various portions thereof rented to tenant defendants, and particularly that this Court declare that defendant Koepke has no power, authority or jurisdiction to issue any order of any kind with respect thereto;

(4) For plaintiff's costs of suit herein; and

(5) For such other and further relief as may to the Court seem meet and just in the premises.

BENT AND CLAPP

By (Signed) Austin Clapp

Attorneys for Plaintiff [13]

EXHIBIT A

Name of Defendant	Apt. No.	Date of Lease	Month Under Lease Rent per	Maximum Rent Purported
Melvin G. King and Jamies F. King	102	8/ 8/42	\$125.00	\$50.00
A. Vanca, C. Gaffney, N. J. Patterson and W. R. Wilkins	103	10/16/47	125.00	47.50
Gertrude Silverstein and Dorothy Haylanski	105	1/29/48	110.00	47.50
John W. Castle	106	2/25/48	90.00	37.50
Richard L. Nugent and Byron Long	107	1/23/48	90.00	37.50
Robert H. Kent and Eunice E. Kent	108	1/17/48	90.00	37.50
Eleanor Chesarek	109	10/20/47	90.00	37.50
William Robinson and Tom Stillwell	110	8/14/48	110.00	42.50
S. D. Taylor and Bea Taylor	202	1/18/48	110.00	45.00
Olga Schmel	203	7/21/48	90.00	37.50
Barbara Negley	204	10/24/47	90.00	37.50
Claire Prater and Lula Mae Stewart	205	3/10/48	90.00	37.50
Ellen Van Goethem	206	8/ 1/48	110.00	47.50
Lorraine Farlowe	207	4/23/48	90.00	37.50
Mr. and Mrs. R. B. Miller	208	10/11/47	90.00	37.40
Max Taylor and David Allen	209	10/13/47	100.00	42.50
Larua Folan and Frank T. Folan	210	8/ 9/48	90.00	37.50

Name of Defendant	Apt. No.	Date of Lease	Rent per Month Under Lease	Purported Maximum Rent
Joan Engelhardt	301	9/20/47	110.00	50.00
Jewell Ely, Elizabeth Walker, Leslie Ely	302	9/21/47	100.00	45.00
Mr. and Mrs. F. R. Cheney	303	9/24/47	90.00	37.50
				[14]
Sol Seltzer and Sam Lazerwitz	304	6/ 1/48	90.00	37.50
Glenna Wallace and Dorothy Dunker	305	10/ 1/47	90.00	37.50
Marion Clark and Dorothy Burtch	306	9/20/47	100.00	47.50
Lambert Bayhi and L. A. Ohlgren	307	10/ 8/47	90.00	37.50
Theresa Spunzo and June Carlson	308	10/13/47	90.00	37.50
W. Marsden and P. Smith	309	10/13/47	100.00	42.50
Andrew J. Starr	310	10/ 6/47	90.00	37.50
				[15]

POINTS AND AUTHORITIES

The statute itself excludes from the category of controlled housing accommodations, and consequently from its application, housing accommodations which were not rented from February 1, 1945 to January 31, 1947, both dates inclusive.

Housing and Rent Act of 1947, Pub. L. 129, 80th Cong., Sec. 202(c)(3)(b).

The prohibitions of the Act, and the regulation of evictions thereunder, expressly relate only to "Controlled" housing accommodations.

Housing and Rent Act of 1947, Secs. 204(b), 206(a), 209(a).

Premises are not "rented" within the meaning of the rent control acts and regulations unless the conventional relationship of landlord and tenant exists.

Moss v. Williams, 84 A. C. A. 1064, 191 Pac. (2d) 804.

The office of the Housing Expediter and its predecessor agencies have consistently ruled (until this case arose) that a landlord may set his own tentative rental upon a new combination of rooms offered by him where and because the combination was "not rented" on March 1, 1942 or during the two months ending on that date.

Rent Regulations for Housing, Section 4(e), 10 F. R. 3436.

Rent Regulation for Housing, Official Interpretations (Rev. July 1, 1945) issued by Office of Price Administration, Washington, D. C. pages 40-48.

Hearings Before the Committee on Banking and Currency, 80th Congress, 1st Session, March 17-28, 1947, pages 100-101; pages 158-159 Statement of Ivan D. Carson, then Deputy Commissioner for Rent, Office of Price Administration, Office of Temporary Controls.

The Housing Expediter's authority (and necessarily that of his subordinates) is expressly limited to regulations and orders "consistent" with the Act.

Housing and Rent Act of 1947, Sec. 204(d). [16]

Where a defendant is an official and attempts to interfere with contractual relations between other individuals by acts in excess of the statutory authority given to the agency by which he is employed:

(a) He commits a tort;

Imperial Ice Co. v. Rossier, 18 Cal. (2d) 33, 112 Pac. (2d) 631.

Nine Safety Appliances Co. v. Forrestal, 326 U. S. 371, 373, see especially footnote 3, p. 373.

(b) He may be restrained from such conduct in the jurisdiction where he is acting without joining his official superior.

Williams v. Fanning, 68 S. Ct. 188.

Noce v. Edward C. Morgan Co., 106 Fed. (2d) 746.

An injunction may be granted against a public officer when it appears that the officer is acting illegally.

Brock v. Superior Court, 11 Cal. (2d) 682, 81 Pac. (2d) 931.

Loftis v. Superior Court, 25 Cal. App. (2d) 346, 77 Pac. (2d) 491.

And a temporary injunction may be granted under such circumstances.

Agricultural Prorate Commission v. Superior Court, 31 Cal. App. (2d) 518, 88 Pac. (2d) 253.

Where it is apparent that resort to administrative remedies would be useless, an action for injunction is not premature because of failure to resort to such remedies.

Gamerren v. Fresno, 51 Cal. App. (2d) 235, 124 Pac. (2d) 621.

A Fortiori, this is so, where the reviewing body has no more jurisdiction than the inferior agency.

Where an agent of the Government acts without authority . . . he ceases to act in an official capacity and a suit against him is not a suit against the Government . . . It follows that the exemption if the Government from suit does not exempt or protect its officers from being sued when they are proceeding without authority . . .

Oklahoma v. Guy F. Atkinson Co., et al., 37 F. S. 93, at p. 96; affirmed 313 U. S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487; State of Colorado v. Toll, 268 U. S. 228; Land v. Dollar, 330 U. S. 731. [17]

[Verified.]

[Endorsed]: Filed Sep. 21, 1948. Edmund L. Smith, Clerk. [18]

In the Superior Court of the State of California in and for the County of Los Angeles

Frank W. Babcock, Plaintiff, vs. Ben C. Koepke, et al.,
Defendants. No. 549890.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading plaintiff's verified complaint, heretofore filed herein, and good cause appearing therefor,

It Is Ordered, that defendant Ben C. Koepke, Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, be and appear before the above-entitled court, in Department 34 thereof, in the City Hall, City of Los Angeles, County of Los Angeles, State of California, on the 24th day of September, 1948, at 9:30 A. M. of said day, or soon thereafter as counsel can be heard, then and there to show cause, if any he has, why he should not be enjoined and restrained during the pendency of this action and until final judgment herein, and why his agents, servants and employees and all persons acting in concert with him should not be similarly restrained and enjoined from:

(a) Issuing or purporting to issue the proposed or any order or orders fixing or purporting to fix a maximum rent or rents for the premises known as 660 West Jefferson, Los Angeles, California, or for any part thereof; [19]

(b) Claiming or asserting that on September 1, 1947, or at any time since that date there was, or has been, or is a maximum rent for the premises at

660 West Jefferson, Los Angeles, California, or for any part thereof;

(c) Taking any step or proceeding intended to or attempting to enforce any order such as described in subparagraph (a) above, or to enforce any claim or assertion such as is described in subparagraph (b) above;

It Is Further Ordered that pending the hearing upon the foregoing order to show cause the defendant Ben C. Koepke, his agents, servants and employees, and all persons acting in concert with him be, and they hereby are, and each of them is, enjoined and restrained from doing or attempting to do, directly, or indirectly, any of the acts mentioned in the preceding paragraph as to which the said Koepke is to show cause why he should not be enjoined and restrained from doing during the pendency of this action and until final judgment herein;

It Is Further Ordered that plaintiff shall serve a copy of this Order, together with a copy of the summons and complaint in this action on defendant Koepke by September 18, 1948.

Dated: Sept. 16, 1948.

Bond \$500.00.

CLARENCE M. HANSEN (S)

Judge of the Superior Court

[Endorsed]: Filed Sep. 21, 1948. Edmund L. Smith, Clerk. [20]

[Title of District Court and Cause]

ORDER ENJOINING FURTHER PROCEEDINGS
IN STATE COURT IN REMOVED CASE

The defendant B. C. Koepke (sued herein as Ben C. Koepke) having filed his petition for removal of the action styled Frank W. Babcock vs. Ben C. Koepke, et al., Case No. 549,890 in the Superior Court of the State of California, in and for the County of Los Angeles, to the District Court of the United States for the Southern District of California, Central Division, together with a copy of all process, pleadings or orders served upon him and having thereupon filed a copy of said petition for removal in said Superior Court with the Clerk thereof, and having thereupon served upon plaintiff Frank W. Babcock a written notice of the filing of said petition in this District Court, and this Court being fully advised concerning in the premises,

Now, Therefore, this Court finds that there has been full compliance with the provisions of Sections 1446, subdivisions (a) to (f) inclusive of the United States Judicial Code as said sections become effective on September 1, 1948, and this Court further finds that by virtue of the foregoing proceedings the said action now stands removed to the United States District Court for the [21] Southern District of California, Central Division, and that nothing further remains to be done by petitioner to effect said removal, and

It Is Ordered that the plaintiff Frank W. Babcock, his agents, servants, employees, attorneys and all other per-

sons acting in concert or participation with him be and are restrained and enjoined from continuing with or taking any further steps for or in connection with the prosecution of the case of Frank W. Babcock vs. Ben C. Koepke, et al., Case No. 549,890, in the Superior Court of the State of California, in and for the County of Los Angeles.

Dated: Los Angeles, California, this 22nd day of September, 1948.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Sep. 22, 1948. Edmund L. Smith, Clerk. [22]

[Title of District Court and Cause]

MOTION OF BEN C. KOEPKE TO DISMISS THE COMPLAINT

Defendant Ben C. Koepke moves the Court to dismiss the above entitled cause for the following reasons:

1. This defendant as Area Rent Director of the Los Angeles Defense Rental Area Office is a subordinate official subject to the orders of his superior who is Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, an independent agency of the United States, as appears from the complaint, and cannot be sued or enjoined unless said Housing Expediter is properly made a party to the action.

2. That Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, is a necessary and indispensable party-defendant to this action, and no service has been obtained or can be obtained upon said Tighe E. Woods, since his official residence is in Washington, D. C. Therefore this suit must be dismissed because there is no jurisdiction over said Tighe E. Woods as a necessary and indispensable party-defendant. [23]

3. The within action is attempted to be maintained as a suit against the United States of America which has not consented to be sued herein.

4. The complaint herein fails to state a claim upon which relief can be granted.

Dated: Los Angeles, California, this 27th day of September, 1948.

ABE I. LEVY
STEPHEN D. MONAHAN
FRANK L. HIRST
RICHARD G. SOLOF
BENJAMIN CHAPMAN

By Benjamin Chapman

Attorneys for Defendant Ben C. Koepke [24]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 27, 1948. Edmund L. Smith, Clerk. [25]

[Title of District Court and Cause]

AFFIDAVIT OF B. C. KOEPKE IN SUPPORT OF
HIS MOTION TO DISMISS

State of California

County of Los Angeles—ss.

I, B. C. Koepke, having been first duly sworn, depose
and say as follows:

That I am the person sued herein as Ben C. Koepke.

That I am Area Rent Director for the Los Angeles
Defense Rental Area Office of the Office of the Housing
Expediter. My authority as Area Rent Director does
not include the authority to commence court actions pur-
suant to the provisions of the Housing and Rent Act of
1947 as amended. Insofar as court actions are concerned
my authority goes so far only as to receive complaints
and investigate violations or suspected violations of said
Act and Regulations and in appropriate cases to refer
such matters to the Litigation Section of the Office of
the Housing Expediter in Los Angeles for its acceptance
or rejection.

Dated: Los Angeles, California, this 28th day of Sep-
tember, 1948.

B. C. KOEPKE

Area Rent Director

Subscribed and sworn to before me this 28 day of Sep-
tember, 1948.

(Seal)

H. C. ZECH

Notary Public in and for the Above County and
State

My Commission Expires 10/26/51 [26]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 29, 1948. Edmund L. Smith,
Clerk. [27]

[Title of District Court and Cause]

AFFIDAVIT OF TIGHE E. WOODS, HOUSING
EXPEDITER, IN SUPPORT OF MOTION OF
DEFENDANT, BEN C. KOEPKE, INDIVIDU-
ALLY, AND AS AREA RENT DIRECTOR, LOS
ANGELES DEFENSE-RENTAL AREA, OF-
FICE OF THE HOUSING EXPEDITER, TO
DISMISS THE COMPLAINT

Tighe E. Woods, being first duly sworn, deposes and
says:

That he is presently the duly appointed and qualified
Housing Expediter of the Office of the Housing Expediter,
pursuant to appointment as Acting Housing Expediter by
the President of the United States in Executive Order
dated November 1, 1947 (12 F. R. 7265), and by appoint-
ment during recess of the Senate on December 20, 1947
as Housing Expediter, said appointment as Housing Ex-
pediter having been confirmed by the United States Senate
on April 30, 1948 (Cong. Rec. Vol. 94, No. 78, at page
5237, April 30, 1948), that as such official, affiant is now
and has been since said date [28] of appointment, admin-
istering the powers, functions, and duties under the Hous-
ing and Rent Act of 1947 (50 U. S. C. App. Sec. 1881,
et seq.), as is provided in Section 204(a) thereof; that his
official residence now is and at all times since November
1, 1947, has been in the City of Washington, District of
Columbia; that his home is not in the State of California,
and he is not an inhabitant thereof.

Affiant further says that at no time has he, as Housing
Expediter, been personally served with summons or other
process in the above entitled action; that at no time has
a copy of the Summons or a copy of the Complaint, either
or both, in the within action, been delivered to or left at

the usual place of abode of affiant since institution of the within action, and that affiant, since his appointment, has at no time authorized or appointed any person his agent to accept or receive service of summons or other process for or on his behalf in the within action, or in any other action.

TIGHE E. WOODS

Subscribed and sworn to before me this 27th day of September, 1948.

(Seal)

KATHERINE L. WEED

Notary Public in and for the City of Washington,
District of Columbia

My Commission expires 3/31/53 [29]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 29, 1948. Edmund L. Smith,
Clerk. [30]

[Title of District Court and Cause]

AFFIDAVIT FOR AND ORDER GRANTING CON-
TINUANCE OF HEARING ON MOTION TO
DISMISS

Austin Clapp, being first duly sworn, deposes and says:

He is attorney for the plaintiff in the above-entitled action. A motion to dismiss as against the defendant Ben C. Koepke has been filed by that defendant and has been noticed for hearing before this Court on October 18, 1948 at 10:00 o'clock A. M.

This action was filed on September 16, 1948 and the Motion to Dismiss was filed on or about the 28th day of September, 1948. On September 21, 1948, a petition for

removal of this case from the Superior Court of the State of California in and for the County of Los Angeles to this Court had been filed and served on affiant, and on September 22, 1948 there was served on affiant an Order Enjoining Further Proceedings in State Court, issued by this Court.

Since the 16th day of September, 1948, in addition to carrying on the general work of his office, affiant has been required to do extensive research upon the legal problems raised by this case. Affiant has been required to read and digest, among other things, the matters affecting rent control contained in six volumes of testimony before the Committees on Banking and Currency of the Senate and the House of Representatives, in The Congressional Record from January to and including June, 1947, and all of the reported opinions of the Administrator of the Office of Price Administration and of the Housing Expediter, relating to rent control. In addition, affiant has been required to do research to see whether or not a Petition for Removal was proper, and to consider whether or not a Motion to Remand the case to the State Court should be made.

Affiant is of the opinion that, in order properly to present the plaintiff's opposition to the Motion to Dismiss, it will be necessary to file a number of affidavits covering phases of this case and to prepare and submit a detailed brief dealing extensively, among other things, with the legislative history of the Provisions of the Housing Rent Act of 1947, as amended, which are involved herein.

It will be necessary for affiant to spend at least three (3) full working days in the preparation of the brief, and an additional four (4) working days to prepare the necessary affidavits. In addition, while it is not certain it

may be necessary for affiant to travel to San Diego to secure affidavits from Officers of the Eleventh Naval District who are stationed at San Diego, California.

The time available between the present time and the present date for the hearing on the Motion to Dismiss, namely, October 18, 1948, will not be sufficient to enable this work to be done and to enable the affidavits and brief to be served and filed in time to be read and considered either by the Court or by Counsel for the defendant Ben C. Koepke.

Wherefore, affiant prays that this Court issue its Order continuing the hearing of the Motion to Dismiss from the 18th day of October, 1948 to the 1st day of November, 1948 at the hour of 10:00 o'clock A. M. of said day.

AUSTIN CLAPP

Subscribed and sworn to before me this 8th day of October, 1948.

(Seal)

EARL A. LYON

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires June 7, 1949.

ORDER

Upon reading and filing the foregoing affidavit, and good cause appearing therefor,

It Is Ordered that the hearing of the Motion to Dismiss in the above entitled action, now set for October 18, 1948, be, and the same hereby is, continued to November 1, 1948, at the hour of 10:00 A. M. o'clock of said day at

the Courtroom of this Court in the Post Office Building,
312 No. Main Street, Los Angeles, California.

Oct. 8, '48.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Oct. 8, 1948. Edmund L. Smith,
Clerk.

[Title of District Court and Cause]

AFFIDAVIT FOR AND ORDER GRANTING CON-
TINUANCE OF HEARING ON MOTION TO
DISMISS

State of California

County of Los Angeles—ss.

Austin Clapp, being first duly sworn, deposes and
says:

He is attorney for the plaintiff in the above entitled
action. A motion to dismiss action against the defendant
Ben C. Koepke has been filed by that defendant and has
heretofore been continued for hearing to November 1,
1948, at 10:00 o'clock A. M. The previous continuance
from October 18, 1948, to November 1, 1948, was based
on a prior affidavit estimating the time necessary to se-
cure and prepare affidavits and a brief in opposition to the
motion to dismiss.

Since said continuance was granted affiant has dili-
gently engaged in preparing said brief and seeking to
secure said affidavits. The affidavits sought are those of
Robert D. Fisher, Financial Vice President of the Uni-
versity of Southern California and of Helen Hall More-
land, Dean of Women of the University of Southern Cali-

fornia, as to certain Records and files of their respective offices relating to the use and occupancy of the premises at 660 West Jefferson, Los Angeles, California, during the period February 1, 1945 to and including January 1, 1947.

Up to the time of this affidavit said persons have refused to make said affidavits voluntarily and affiant is engaged in discussions with the firm of Stephens, Jones & La Fever, attorneys representing said University, for said persons in their official capacities, attempting to secure said affidavits, or, alternatively, to take the depositions of said persons.

Under Rule 26 of the Federal Rules of Civil Procedure, as amended, affiant has agreed with counsel for the defendant, Ben C. Koepke, to take said depositions on the 21st day of October, at 2:00 o'clock P. M. if it is necessary to do so. As a result of the foregoing facts it has been impossible for affiant to secure the evidence in question or to finish his brief in this matter in time to present the same to the court by October 20th, 1948, and in the event that it is necessary to take said depositions, in the opinion of affiant, he will be unable to present said depositions and his brief prior to November 1, 1948.

Wherefore, affiant prays that this Court issue its order continuing the hearing of the motion to dismiss from the first day of November, 1948, to the 22d day of November, 1948, at the hour of 10:00 o'clock A. M. of said day.

AUSTIN CLAPP

Subscribed and sworn to before me this 15th day of October, 1948.

(Seal)

EARL A. LYON

Notary Public in and for the County of Los Angeles,
State of California

ORDER

On reading and filing the foregoing affidavit, and good cause appearing therefor,

It Is Ordered that the hearing of the Motion to Dismiss in the above entitled action, now set for November 1, 1948, be, and the same hereby is continued to November 22, 1948, at the hour of 10:00 o'clock A. M. of said day in the Courtroom of this Court in the Post Office Building, 312 No. Main Street, Los Angeles, California.

Dated: October 15, 1948.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Oct. 15, 1948. Edmund L. Smith, Clerk.

[Title of District Court and Cause]

PLAINTIFF'S REQUEST FOR ADMISSIONS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, as amended, plaintiff hereby requests the defendant, Ben C. Koepke, within ten (10) days after the service of this request, to admit, for the purpose of the pending action only, as provided in said rule, that the following facts are true, and that the documents attached to this request are true copies of the originals thereof, and that the originals thereof are true and genuine documents, forming a part of the records of the Office of the Housing Expediter:

(1) That Edwin N. Dupree, Jr. occupied, at various times between January 1, 1943 and the present time, the offices of Senior Attorney, Rent Legal Division, Office of Price Administration; Chief Counsel, Rent Division, Office, of Price Administration; Chief Counsel, Rent Division, Office of Price [31] Administration, Office of Temporary Controls; and General Counsel, Office of Rent Control, Office of the Housing Expediter.

(2) That Edwin N. Dupree, Jr., as Senior Attorney, Rent Legal Division, Office of Price Administration, was a member of the Board of Review which rendered an opinion and recommendation in the matter of Mignon A. Weber, Office of Price Administration, Docket No. RPA - IV - 61 - P, reported at 3 Office of Price Administration, Opinions and Decisions, page 3468, et sequitur.

(3) That Edwin N. Dupree, Jr., as Chief Counsel, Rent Legal Division, Office of Price Administration, was a member of the Board of Review which rendered a report and recommendation in the matter of William B. Schwarz, Office of Price Administration, Docket No. RPA - IV - 53 - P, reported in 4 Office of Price Administration, Opinions and Decisions, page 3088, et sequitur.

(4) That Edwin N. Dupree, Jr., as Chief Counsel, Rent Legal Division, Office of Price Administration, Office of Temporary Controls, read and approved the prepared statement of Ivan D. Carson, the Deputy Commissioner for Rent, Office of Price Administration, Office of Temporary Controls, which statement was filed with the House of Representatives, Committee on Banking and Currency, 80th Congress, First Session, which appears on page 158, printed report of that committee, hearings on Rent Control.

(5) That Edwin N. Dupree, Jr., as General Counsel, Office of Rent Control, Office of the Housing Expediter, issued and approved the interpretations of Section 1 (b) (2) of the regulations issued under the Housing and Rent Act of 1947, as amended, which were issued on or about August 25, 1948, and appeared in Volume 13, Federal Register, page 5001, et sequitur. [32]

(6) That on March 16, 1948, in Docket No. 262,263 the Los Angeles Defense Rent Area Office, Office of Rent Control, Office of Housing Expediter, Defendant Ben C. Koepke issued an order rejecting the decontrol application of Amil Shab.

(7) That on June 23, 1948, Ward Cox, as Regional Housing Expediter, Region VIII, Office of the Housing Expediter, in Docket 8-LA-262,263 of his office, issued an opinion and order affirming the order of the defendant B. C. Koepke, described in request number (6) above.

(8) That on October 7, 1948, J. Walter White, as acting Housing Expediter of the Office of the Housing Expediter in Docket No. RA-VIII-43 issued an opinion and order vacating the orders described in requests Numbers (6) and (7) above and dismissing the appeal of Amil Shab.

(9) That the copies of said orders of March 16, 1948, of June 23, 1948, and of October 7, 1948, attached hereto, are true and correct copies of said orders as the same appear in the records and files of the Office of the Housing Expediter.

Dated: October 15, 1948.

BENT AND CLAPP

By Austin Clapp

Attorneys for Plaintiff [33]

Office of Housing Expediter
Office of Rent Control
1206 Santee Street
Los Angeles 15, California

ORDER REJECTING DECONTROL APPLICATION

Apartment No. (All Units)
Docket No. 262263 CPB:ami

“City Hotel and Annex”

To: []

Name and Address of Landlord	Amil Shab 736 San Julian Street Los Angeles, California
------------------------------	---

Based upon the information furnished on Form D-95 (Application for Decontrol) and all other available information, the Rent Director has determined that all units in the establishment are not decontrolled by the Housing and Rent Act of 1947 for the reason checked ☒ below:

1. [] The establishment was not, on June 30, 1947, a tourist home serving transient guests exclusively.
2. [x] The establishment was not, on June 30, 1947, commonly known as a hotel in the community.

3. [] The units listed on the attached schedule did not, on June 30, 1947, receive all of the services specified in the Housing and Rent Act of 1947.

4. []

The maximum rents for the housing accommodations remains as of June 30, 1947 unless changed by order, and any rent collected in excess of these amounts must be refunded to the tenants.

B. C. KOEPKE

Area Rent Director for the Los Angeles Defense
Rental Area

Mar 16 1948

(Date) [34]

Office of
THE HOUSING EXPEDITER
Regional Office 9th Floor
1355 Market Street
San Francisco 3, California
June 23, 1948

In Reply Refer to:

Mr. Amil Shab
c/o Ben & Clapp
Attorneys-at-Law
3780 West Sixth Street
Los Angeles 5, California

Re: Application for Review – Docket 8-La-262263
Concerning Housing Accommodations located at
732½ and 734½ San Julian Street, Los Angeles,
California

Enclosed herewith is a copy of an order this day issued
by the Regional Housing Expediter in the above matter

affirming the Rent Director's determination and denying your application for review.

Yours very truly

William Goldbaum

Regional Rent Attorney

By Hazel C. McKinnon

Hazel C. McKinnon

Regional Rent Examiner

Attachment

cc: B. C. Koepke, Director

Los Angeles Defense-Rental Area [35]

UNITED STATES OF AMERICA
BEFORE THE OFFICE OF THE HOUSING
EXPEDITER

In the Matter of the)	
Application for Review of)	
)	
Amil Shab,)	Docket 8-LA-262263
)	
Applicant)	

OPINION AND ORDER AFFIRMING DETER-
MINATION OF THE RENT DIRECTOR

On April 9, 1948, an application for review was filed by Amil Shab, herein called applicant, requesting a review of an order relating to housing accommodations located at 732½-734½ San Julian Street, Los Angeles, California, entered by the Rent Director for the Los Angeles Defense-Rental Area on March 16, 1948.

The order of the Rent Director determined that the housing accommodations in the subject establishment are not eligible for decontrol under the Housing and Rent Act of 1947, for the reason that the establishment was

not, on June 30, 1947, commonly known as a hotel in the community.

In his application for review, applicant states that he is the owner of the subject establishment and is the lessee of the adjoining property which is and has been commonly known as the City Hotel and in which certain rooms have heretofore been decontrolled. He states, further, that the rooms in the establishment which is the subject of this application for review were vacated prior to December 31, 1947, and that the applicant thereafter expended certain funds in rehabilitating the premises and that in January 1948 he commenced operating the subject establishment as an annex to the City Hotel. Applicant contends that the Housing and Rent Act of 1947, as amended, does not fix any time as to when an establishment must be commonly known as a hotel in order to qualify for decontrol and that it does not provide that existing hotel accommodations in establishments commonly known as hotels cannot be enlarged or that adjoining buildings cannot be made a part of a hotel under the same management. Applicant further contends that the Area Rent Director and the Housing Expediter are without jurisdiction to issue regulations or orders denying decontrol in a situation of this kind.

Answering first the contention of applicant that the Area Rent Director and the Housing Expediter are without jurisdiction to issue regulations or orders denying decontrol in a situation of this kind, the Regional Housing Expediter quotes Section 204(d) of the Housing and Rent Act of 1947, as amended, which reads as follows:

“(d) the Housing Expediter is authorized to issue such regulations and orders consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and Section 202(c).” [36]

Upon review, the record of the area rent office shows that the establishment in question was not operated as a hotel on June 30, 1947, and was not commonly known as a hotel in the community on that date. It, therefore, does not meet the qualifications for decontrol as set forth in the Housing and Rent Act of 1947. The Regional Housing Expediter has considered this matter in the light of the recent amendments to the Housing and Rent Act of 1947, and it is his opinion that the subject establishment does not qualify for decontrol under the provisions of the amended Act and the Regulations.

Due consideration has been given to said application for review, to the record of proceedings before the Rent Director, and to the record of proceedings herein. Upon review, the Regional Housing Expediter is of the opinion that applicant's objections as set forth in his application for review are without merit. It is the further opinion of the Regional Housing Expediter that the record is sufficient to support the determination of the Rent Director that the establishment in question was not, on June 30, 1947, commonly known as a hotel in the community in which it is located and his action in rejecting applicant's application for decontrol is appropriately substantiated by the record and is otherwise in accordance with applicable law and regulations.

By virtue of the authority vested in the Housing Expediter by the Housing and Rent Act of 1947, as amended, and in accordance with applicable rent and procedural regulations issued thereunder, it is ordered that the determination of the Rent Director be, and it hereby is, denied.

Issued and effective this 23 day of June, 1948.

Ward Cox

Regional Housing Expediter for Region VIII
Office of the Housing Expediter [37]

UNITED STATES OF AMERICA
BEFORE THE OFFICE OF THE HOUSING
EXPEDITER

In the Matter of)	
)	
Amil Shab)	Docket No. RA-VIII-43
)	
Appellant)	

OPINION AND ORDER VACATING ORDERS
AND DISMISSING APPEAL

The appeal herein is from an order issue by the Regional Housing Expediter denying an application for review of an order entered by the Rent Director for the Los Angeles Defense-Rental Area on March 16, 1948¹ determining that the housing accommodations at 732½-734½ San Julian St., Los Angeles, California, were not eligible for decontrol as hotel accommodations under the Housing and Rent Act of 1947. The order was based upon the finding that the establishment was not commonly known as a hotel in the community on June 30, 1947.

The Housing and Rent Act of 1947, as amended, expressly removes from the scope of rent control

“ . . . those accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service . . . ”

¹Area Docket No. 8-LA-262263.

Appellant contends that its accommodations come within that statutory definition and that they are therefore decontrolled.

It is the opinion of the Housing Expediter that a determination under the statute of the control or decontrol status of the subject accommodations properly may be made by a court of competent jurisdiction and does not require in this instance determination by the Housing Expediter. The Housing Expediter, therefore, believes that it is unnecessary that he pass upon the merits of the case. Accordingly, it is appropriate that the orders of the Rent Director and the Regional [38] Housing Expediter be vacated.

The action taken herein does not constitute a finding upon the merits; the accommodations are decontrolled only if the requirements of Section 202(c) of the Housing and Rent Act of 1947, as amended, are satisfied. Further, this order which vacates the prior order rejecting the request for decontrol, must not be construed as a finding that the accommodations are decontrolled or that the orders of the Rent Director and Regional Housing Expediter were improper or invalid or that compliance or enforcement action, if warranted, will not be taken. The effect of the present action simply is to leave to a court of competent jurisdiction the function of making any required determination as to such decontrol or control status.²

Accordingly, by virtue of the authority vested in the Housing Expediter by the Housing and Rent Act of

²Appellant may, if desired, request a formal opinion from the appropriate Area office as to the present decontrol or non-decontrol status of the accommodations under the Housing and Rent Act of 1947, as amended April 1, 1948. Such opinion would not be subject to review or appeal.

1947, as amended, and pursuant to the provisions of the appropriate regulations issued thereunder, it is ordered that the order of the Rent Director, issued on March 16, 1948, and the order of the Regional Housing Expediter issued on June 23, 1948, be, and they hereby are, vacated; and that the appeal herein, Docket No. RA-VIII-43, be, and it hereby is, dismissed.

Issued and effective this 7 day of October, 1948.

/s/ J. Walter White

J. Walter White

Acting House Expediter

Certified to Be True Copy of Original

Katherine L. Weed,

Katherine L. Weed

Certifying Officer [39]

Office of
THE HOUSING EXPEDITER
Washington 25, D. C.
Oct 7 1948

In Reply Refer to:
GC-2-2

Registered Mail
Return Receipt Requested

Bent and Clapp, Esqs.
3780 West Sixth Street
Los Angeles, California

Re: Docket No. RA-VIII-43
Amil Shab

Gentlemen:

Enclosed is a certified copy of an Opinion and Order Vacating Orders and Dismissing Appeal, issued on Oc-

tober 7, 1948, by J. Walter White, Acting Housing Expediter, in the matter of the above docketed appeal.

Sincerely yours,

Katherine L. Weed

KATHERINE L. WEED

Certifying Officer

Enclosure

[Endorsed]: Filed Oct. 19, 1948. Edmund L. Smith, Clerk. [40]

[Title of District Court and Cause]

REPLY TO PLAINTIFF'S REQUEST FOR
ADMISSIONS

Answering plaintiff's request for admissions, defendant Ben C. Koepke admits or denies as follows:

I.

Admits Items 1, 2, 3, 5, 6, 7, 8, and 9 of plaintiff's request for admissions.

II.

Fails to admit or deny Item 4 of plaintiff's request for admissions on the ground that this defendant has insufficient information on which to base such admission or denial.

Dated: Los Angeles, California, this 20th day of October, 1948.

BEN C. KOEPKE [41]

[Verified.] [42]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 20, 1948. Edmund L. Smith, Clerk. [43]

[Title of District Court and Cause]

AFFIDAVITS IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS, AND IN OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMI-
NARY INJUNCTION AND ORDER TO SHOW
CAUSE

Plaintiff files herewith the following affidavits:

1. Affidavit of Joan Engelhardt.
2. Affidavit of Marion Clark.
3. Affidavit of Dorothy Burtch.

Dated: Los Angeles, California, this 15th day of November, 1948.

ABE I. LEVY
STEPHEN D. MONAHAN
FRANK L. HIRST
RICHARD G. SOLOF
BENJAMIN CHAPMAN

By Benjamin Chapman
Attorneys for Defendant, Ben C. Koepke [44]

[Title of District Court and Cause]

AFFIDAVIT OF JOAN ENGELHARDT

State of California

County of Los Angeles—ss.

I, Joan Engelhardt, having been first duly sworn, depose and say as follows:

My name is Joan Engelhardt and I reside at Shrine Arms Apartments, 660 West Jefferson Boulevard, Los Angeles, California, in Apartment No. 301. I was a student at the University of Southern California from about September 20, 1946 until about June 20, 1948.

During that period I resided at 660 West Jefferson Boulevard, Los Angeles, which, during that period from about September, 1946 to June, 1947 was known as Sequoia Hall. I resided there pursuant to a written contract with the University of Southern California which was approved by my parent and which required me to pay as rent for the apartment I occupied the sum of \$115.00 per semester, of which the University was willing to accept payment pursuant to a convenient arrangement with the student. I paid the sum for the first semester all at one time. [45]

From September 20, 1946 to about January, 1947 I occupied Apartment 303 at the above address. This apartment consisted of a living room with one drop-down bed, a kitchen and a bath. The apartment was furnished. It had a double bunk bed and one bunk was occupied by me and another by my room-mate, Mary Alice Pearson. We were not permitted by the University to use the drop-down bed. Probably, the drop-down bed was not equipped with bedding. Each occupant in the apartment had a separate arrangement for rental with the University. The occupant's privileges were limited to their own apartments.

I am familiar with the general condition of four apartments at the time the University of Southern California occupied Sequoia Hall for its women students and the general condition of the same apartments after Mr. Frank W. Babcock became the landlord of the building.

I saw Apartment No. 301 when it was part of Sequoia Hall in 1946 and I have lived in it since September 20, 1947 and am now occupying it. When Mr. Babcock became landlord he took out a radiator, ran an electric cord down from the main lighting fixture to the base-board in the living room, added one bed placing it in the little

bedroom and removed the bunk beds and refurnished the apartment.

I lived in Apartment No. 303 from the beginning of the Fall semester in 1946 until about January 1947. I have seen the inside of the apartment since Mr. Babcock became the landlord. There have been no changes in the apartment other than the removal of the bunk bed and the active use of the wall bed and changes in furnishings and fixtures. Changes in furnishings and fixtures were made in all apartments that I am familiar with since Mr. Babcock became the landlord.

I lived in Apartment 305 about from January 1947 to June 20, 1947. I have seen the inside of the apartment from time to time since I moved out of it until the present time. There have been no changes in the apartment since Mr. Babcock became landlord except that he has refurnished the same.

I have visited Apartment No. 302 from time to time between September 1946 and the present. There have been no changes in the inside of this apartment other than the refurnishing of the same since Mr. Babcock became landlord. [46]

In the four apartments mentioned in the preceding portion of this affidavit no structural changes were made after Mr. Babcock became owner. There were no changes relating to walls, windows or doors other than repair or redecoration.

The apartments above mentioned were completely furnished prior to Mr. Frank W. Babcock becoming the landlord in the summer of 1947. The furnishings were in poor condition and Mr. Babcock replaced most, if not all, of the furnishings in the above mentioned apartments.

Dated: Los Angeles, California, this 9th day of November, 1948.

JOAN ENGELHARDT

(Subscribed and sworn to before me this 9th day of November, 1948.

(Seal)

H. C. ZECH

Notary Public in and for the Above County and State

My Commission expires Oct. 26, 1951 [47]

[Title of District Court and Cause]

AFFIDAVIT OF MARION CLARK

State of California

County of Los Angeles—ss.

I, Marion Clark, having been first duly sworn, depose and say as follows:

My name is Marion Clark and I reside at Shrine Arms Apartments, 660 West Jefferson Boulevard, Los Angeles, California, in Apartment No. 306. I am and have been a student at the University of Southern California from about February 3, 1947. During the period from about February 3, 1947 until June 13, 1947 I resided at 660 West Jefferson Boulevard, Los Angeles, which, during that period was known as Sequoia Hall. I resided there pursuant to a written contract with the University of Southern California which required me to pay as rent for the apartment I occupied the sum of \$115.00 per semester. I made a deposit of \$25.00 in December, 1946 to hold my reservation and signed a [48] contract with the University of California for the period of about February 3, 1947 to June 13, 1947. The University of

Southern California agreed to refund the deposit of \$25.00 if I notified them 60 days prior to about February 3, 1947, or was unable to occupy the premises on that date because of illness. Except for the above reasons, the \$25.00 deposit was not refundable, and the remainder of the \$115.00 for the semester was to be paid by me unless I could substitute an approved student who would take over the balance of my contract. The University was willing to accept payment pursuant to a convenient arrangement with the student. I paid the \$90.00 balance for this semester all at one time upon arrival at 660 West Jefferson Boulevard, Los Angeles.

From about February 3, 1947 until June 13, 1947 I occupied Apartment 310 at the above address. This apartment consisted of a living room, a kitchen and a bath. The apartment was furnished. It had a double bunk bed and one bunk was occupied by me and another by my room-mate, Dorothy Burtch. Each occupant in the apartment had a separate arrangement for rental with the University. The occupant's privileges were limited to their own apartments.

I saw Apartment No. 306 when it was part of Sequoia Hall in 1947 and I have lived in it since September 20, 1947 and am now occupying it. When Mr. Babcock became landlord he redecorated and refurnished, except for the refrigerator, the apartment. There were no structural changes made in this Apartment. Two closet doors and one bedroom door were rehung at our request. These doors, when brought up to the apartment, were used ones, and were marked with tape. On the tape was lettered "306". Both tape and doors were dusty and dirty. No further changes were made relating to walls, windows, or doors.

The apartments above mentioned were completely furnished, except for cooking utensils, dishes, and bedding, prior to Mr. [49] Frank W. Babcock becoming the landlord in the summer of 1947. The furnishings were in poor condition and Mr. Babcock replaced all of the furnishings, except the refrigerator, in this apartment.

Dated: Los Angeles, California, this 12th day of November, 1948.

MARION CLARK

Subscribed and sworn to before me this 12th day of November, 1948.

HEYBURN F. PRICE

Investigator

Pursuant to Authority of P. L. 862,
80th Congress, 13 F. R. 4533. [50]

[Title of District Court and Cause]

AFFIDAVIT OF DOROTHY BURTCH

State of California

County of Los Angeles—ss.

I, Dorothy Burtch, having been first duly sworn, depose and say as follows:

My name is Dorothy Burtch and I reside at Shrine Arms Apartments, 660 West Jefferson Boulevard, Los Angeles, California, in Apartment No. 306. I am and have been a student at the University of Southern California from about February 3, 1947. During the period from about February 3, 1947 until June 13, 1947 I resided at 660 West Jefferson Boulevard, Los Angeles, which, during that period was known as Sequoia Hall. I resided there pursuant to a written contract with the

University of Southern California which required me to pay as rent for the apartment I occupied the sum of \$115.00 per semester. I made a deposit of \$25.00 in December, 1946 to hold my reservation and signed a [51] contract with the University of California for the period of about February 3, 1947 to June 13, 1947. The University of Southern California agreed to refund the deposit of \$25.00 if I notified them 60 days prior to about February 3, 1947, or was unable to occupy the premises on that date because of illness. Except for the above reasons, the \$25.00 deposit was not refundable, and the remainder of the \$115.00 for the semester was to be paid by me unless I could substitute an approved student who would take over the balance of my contract. The University was willing to accept payment pursuant to a convenient arrangement with the student. I paid the \$90.00 balance for this semester all at one time upon arrival at 660 West Jefferson Boulevard, Los Angeles.

From about February 3, 1947 until June 13, 1947 I occupied Apartment 310 at the above address. This apartment consisted of a living room, a kitchen and a bath. The apartment was furnished. It had a double bunk bed and one bunk was occupied by me and another by my room-mate, Marion Clark. Each occupant in the apartment had a separate arrangement for rental with the University. The occupant's privileges were limited to their own apartments.

I saw Apartment No. 306 when it was part of Sequoia Hall in 1947 and I have lived in it since September 20,

1947 and am now occupying it. When Mr. Babcock became landlord he redecorated and refurnished, except for the refrigerator, the apartment. There were no structural changes made in this apartment. Two closet doors and one bedroom door were rehung at our request. These doors, when brought up to the apartment, were used ones, and were marked with tape. On the tape was lettered "306". Both tape and doors were dusty and dirty. No further changes were made relating to walls, windows, or doors.

The apartments above mentioned were completely furnished, except for cooking utensils, dishes, and bedding, prior to Mr. Frank W. Babcock becoming the landlord in the summer of 1947. [52] The furnishings were in poor condition and Mr. Babcock replaced all of the furnishings, except the refrigerator, in this apartment.

Dated: Los Angeles, California, this 12th day of November, 1948.

DOROTHY BURTCH

Subscribed and sworn to before me this 12th day of November, 1948.

HEYBURN F. PRICE

Investigator

Pursuant to P. L. 862, 80th Congress,
13 F. R. 4533.

[Endorsed]: Filed Nov. 16, 1948. Edmund L. Smith,
Clerk. [53]

[Title of District Court and Cause]

AFFIDAVIT OF IVY GRAY

State of California

County of Los Angeles—ss.

Ivy Gray, being first duly sworn, deposes and says:

From November 1, 1944 to August 31, 1947 I was employed by the University of Southern California as Assistant Resident of the University Residence Hall at 660 W. Jefferson Blvd., Los Angeles, California, which, during that period was known as Sequoia Hall.

The Resident was Mrs. Lorinne Pargellis.

During all of the period mentioned the premises were occupied by women students of the University of Southern California.

The duties of the Resident and Assistant Resident included supervision of the occupants in accordance with the Resi- [57] dence Rules for Women Students of the University. In so doing we were responsible to and directed by the Dean of Women of the University. During the period mentioned above both the Resident and I lived in the said premises in order to carry out our duties.

During this period two of the units were occupied respectively by Mrs. Pargellis and myself, one was used as a social room, and the remainder were assigned to students. The rooms were equipped with bunk beds for sleeping purposes, and, in general, two students were assigned to each room.

During the year 1944-1945, in the three largest units, which had three rooms available for sleeping and living purposes, two students were assigned to each of the two

larger rooms and a single student to the third, smaller room.

IVY GRAY

Subscribed and sworn to before me this 16 day of November, 1948.

(Seal)

AUSTIN CLAPP

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Nov. 17, 1948. Edmund L. Smith,
Clerk. [58]

[Title of District Court and Cause]

AFFIDAVIT OF HUGH C. WILLETT

State of California

County of Los Angeles—ss.

Hugh C. Willett, being first duly sworn, deposes and says: I am now and have been since November 1, 1944, and prior thereto, Director of Admissions and Registration of the University of Southern California.

During each scholastic year, including the scholastic years 1944-1945, 1945-1946, 1947-1948, there has been published by the University of Southern California a booklet entitled, "Circular of Information." The purpose of publishing this booklet, among other things, is to advise prospective students concerning the requirements which must be met for admission, registration, and relating to probation and disqualification, tuition and fees, university residence and student residence.

Exhibit "A" attached hereto is a photostatic copy of [59] certain pages from the "Circular of Information" published by the University of Southern California for

use during the scholastic year, 1944-1945. These photostats are true and correct copies of the pages contained in said bulletin. Said bulletin, containing said pages, was distributed by and in use by officials and students of the University of Southern California during the scholastic year, 1944-1945.

Exhibit "B" attached hereto is a photostatic copy of certain pages from the "Circular of Information" published by the University of Southern California for use during the scholastic year, 1945-1946. These photostats are true and correct copies of the pages contained in said bulletin. Said bulletin, containing said pages, was distributed by and in use by officials and students of the University of Southern California during the scholastic year, 1945-1946.

Exhibit "C" attached hereto is a photostatic copy of certain pages from the "Circular of Information" published by the University of Southern California for use during the scholastic year, 1946-1947. These photostats are true and correct copies of the pages contained in said bulletin. Said bulletin, containing said pages, was distributed by and in use by officials and students of the University of Southern California during the scholastic year, 1946-1947.

Exhibit "D" is a photostatic copy of the form of application for admission used by students during the scholastic year, 1945-1946 and is a true and correct copy of the form in use during that scholastic year. Substantially identical forms were in use during the scholastic years 1944-1945 and 1946-1947.

After examination and evaluation of a student's application for admission and his credentials submitted therewith upon acceptance of him as a student by the university, there was during the scholastic years 1944-1945, 1945-1946 and 1946-1947 [60] issued to such student a registration permit indicating the acceptance of his application for admission and permitting him to become a student at the university by registration. Exhibit "E" is a copy of the form of registration permit now used by the University of Southern California. Substantially equivalent forms were used in preceding years.

HUGH C. WILLETT

Subscribed and sworn to before me this 16 day of November, 1948.

(Seal)

AUSTIN CLAPP

Notary Public in and for Said County and State of California [61]

EXHIBIT A

To Affidavit of Hugh C. Willett

Excerpts from University of Southern California

"Circular of Information"

1944-1945

124

Admission

Recommendations For Teachers' Credentials

The School of Education of the University has been accredited for the training of teachers and has been authorized to issue recommendations to students who comply with the general requirements of the State Board of Education for the following credentials: Administration; Su-

pervision; Junior College; General Secondary; General Junior High School; General Elementary; Kindergarten-Primary; Child Welfare and Supervision of Attendance; Special Secondary in Art, Business Education, Music, Physical Education, Continuation Education, Librarianship.

ADMISSION

Application For Admission

Application for admission to the University may be made by mail or in person at the University Office of Admissions. Application forms will be furnished on request. Students who seek admission will please request the registrars of institutions previously attended to forward official transcripts of record direct to the Office of Admissions. The University does not undertake to collect the credentials of prospective students.

Certificates of permission to register will be issued to applicants whose credentials are found to be acceptable. Other applicants will be advised as to conditions to be met for admission. Applications and high school records should be filed as early as possible to avoid delay at registration.

Directions to Applicant for Admission to the University

Before your eligibility for admission can be determined, it is necessary for the Office of Admissions to receive your formal application for admission, an official certificate of your high school work, and official transcripts of record from all collegiate institutions which you may have attended. The following procedure is recommended:

1. Send for the bulletin you desire and an application blank for admission.
2. Complete the application for admission and mail it to the Office of Admissions.
3. Request the principal of the high school from which you graduated and the registrars of colleges you have attended to send official transcripts of your record to the Office of Admissions.
4. Address to the Office of Admissions any questions you may have concerning your admission or the standing you will be allowed in the University. [62]

Admission

125

5. If you are accepted for admission to the University, you will receive an Admission Credit Summary. Preserve this credit summary, which is also your permit to register, and present it at the place of registration.
6. The Scholastic Aptitude Test is required of all students entering the freshman class or the University Junior College.

Admission By Certificate From High School

General Statement: Graduates of accredited senior high schools, or other accredited secondary schools, who give satisfactory evidence of good character and intellectual promise and who meet the following unit and grade requirements are eligible for admission to freshman standing. The admission of any student is tentative, pending the report of the University medical examiners.

Unit Requirement: fifteen units of credit in subjects accepted for graduation from high school, including (a)

3 units of English; (b) 7 other units in academic subject;¹ (c) 5 units in either academic or nonacademic subjects.

Although a student who is otherwise eligible will be accepted for admission if his 15 entrance units include 3 of English and 7 other units in academic subjects, it will be to his advantage to present for admission at least 2 units of a foreign language, 1 unit of United States history and civics, 1 unit of a natural science with laboratory, 1 unit of algebra, and 1 unit of geometry. Any of these subjects not presented for admission will be regarded as "entrance subject shortages," which must be removed by appropriate courses taken in college or by other methods approved by the Office of Admissions. College courses taken to remove entrance subject shortages, except in the case of algebra, will also give college credit.

Grade Requirement: a scholarship record which places the applicant for admission in the upper half of his high school class. The placement of a student in his class is determined by the high school principal and is reported by him to the University.

In view of the fact that some schools do not rank the members of their graduating classes, and that under some circumstances placement in a class is not significant, especially if the class is small, the University reserves the right to substitute for the above grade requirement any of the following: (1) 8 units of certificate or recommending grade in the last three years of high school work; (2) passing grades in assigned examinations of the College Entrance Examination Board; (3) a satisfactory score in the Scholastic Aptitude Test;² (4) evidence that the high school record would admit the applicant without condition to a college or university of high standing in the state in which the high school work was completed.

¹For admission purposes the following subjects are considered to be *academics*: English, foreign languages, history, mathematics, sciences, social sciences. For admission to the College of Commerce and Business Administration only, the following also are considered to be *academic*: economic geography, economic history, business correspondence, business arithmetic, business law, and business organization.

Fewer than 7 additional units in academic subjects may be accepted in the case of a student who graduates in the highest tenth of his class, and who is recommended for college admission by his principal. Each case will be considered on its individual merits.

²The Scholastic Aptitude Test is required of all freshman and University Junior College entrants. This test will be given at the University on several dates during the year. See the University Calendar.

The Graduate School

1. Applications. Application for admission to the Graduate School is made at the Office of Admissions, where the applicant's credentials are filed and evaluated. To insure early consideration credentials should be filed at least one month previous to the first day of official registration.

2. Credentials. The student's credentials should include certified transcripts from the records of institutions previously attended, listing all preceding courses, with their unit values and the grades attained.

3. Requirements. A Bachelor of Arts degree, or its equivalent, from an accredited college or university admits the holder to the Graduate School. Admission to candidacy for a graduate degree, under the jurisdiction of the Graduate School, is a separate and subsequent step, to be initiated by the student himself at the office of the Graduate School.

4. Transfers. Students who present evidence of having completed graduate work in other institutions will be given a statement from the Office of Admissions regarding the availability of credit for such work at this University. In no case will more than 8 semester units of graduate work be accepted by transfer toward the master's degree.

5. Exceptions. In exceptional cases—falling outside the usual rules and practices concerning admissions—graduates of nonaccredited institutions or applicants adjudged to have the full equivalent of the standard bachelor's degree may be admitted to graduate studies after joint consideration by the Office of Admissions and the

Dean of the Graduate School. In such cases full graduate standing is reached only by action of the Council on Graduate Study and Research.

School of Research

Membership in the School of Research consists of five groups of persons, as follows: *Faculty*: (1) members of professorial rank whose duties involve supervision of graduate research; (2) others of rank of instructor or above, actively engaged in research, who have been recommended by their department heads and admitted by the Council. *Students*: including (1) every graduate on being formally admitted to candidacy for the degree of Doctor of Philosophy, who becomes *ipso facto* a member of the School of Research; and (2) other graduate students holding the master's degree (or equivalent) who have demonstrated undoubted capacity for research and who, on recommendation of their department heads, have been elected by the Council on Graduate Study and Research. *By Courtesy*: scholars and scientists, holding the Ph.D. (or [64]

Registration

139

equivalent), desiring to pursue research, who on recommendation of the Director have been admitted to membership by vote of the Council Members by courtesy are released from all tuition charges and are afforded free auditing and library privileges.

REGISTRATION

Details of the registration procedure are contained in a special bulletin issued by the Registrar and distributed to students on the days of registration. The tests and examinations listed below are a part of registration procedure.

No student may attend classes without having presented either the class admission card or a special permit from the President.

Every student is required to register in person before entering upon his college work. The days and places of registration for each semester are announced in advance, and any student not registered before the first day of instruction is subject to a fee of three dollars for late registration. If registration is delayed until the first day of the second week of instruction, this fee is increased to five dollars and the student is subject to a reduction in the number of units of work he is permitted to carry.

Before registering, every student entering the University for the first time must have from the Office of Admissions a statement that his entrance credits are acceptable or a statement of the conditions under which he is permitted to register.

A Board of Faculty Advisers is appointed by the President to direct the registration of all students.

Lower division students will be assigned to faculty advisers, with whom they must confer in the arranging of programs and to whom they may go for advice in any problems connected with college life.

Upper division students are required to confer with and to have their study programs approved by the professors of their major subjects, who are their faculty advisers during the junior and senior years.

All foreign students who are admitted to the United States on a nonquota immigrant basis must take at least 12 units of semester, to satisfy the stipulation of their being admitted for study at an educational institution.

Subject requirements on courses and the work necessary for completion of subject shortages for admission must have precedence in the registration program of every student for every session until all such shortages are fully removed. (Although it is essential for a student to remove admission shortages in all subjects as soon as possible, he will not be required, prior to his junior year, to register for more than one such subject at a time.) [65]

140

Registration

A student engaging in extracurricular activity or outside work that limits his time and exhausts his energy is subject to a limitation in the number of units he may carry in regular college work.

No student may register for more than 18 hours except as provided by the program of requirements for his degree or as approved by special action of the Student Scholarship Committee. This permission is not granted to any student in his first semester of residence or to any student who is on warning or probation.

Students who are planning to return to college after a semester's absence should notify the Office of the Registrar, in writing, at least two weeks before the registration period.

Students should arrange for all necessary adjustments in their courses before registering for the last 30 units required for the degree, and those expecting to receive degrees at the end of any session should file written notice at the Office of the Registrar at the beginning of the session.

Changes in Registration. No course may be added and no course may be dropped except through the Registrar's Office on blanks specifically provided. The student must

secure the written approval of his faculty adviser before any change will be made at the Registrar's Office. Any change in a student's program after the first seven calendar days of the semester will involve a fee of two dollars. Students are advised to make no changes in registration after the close of that period. Students are not permitted to enter new courses after the close of the third week except for valid reasons and with the approval of the Student Scholarship Committee.

Withdrawal from a Course. A student is held responsible for all courses in which he registers unless he officially withdraws from a course. A student who withdraws from a course after the end of the seventh week of the semester will be assigned a grade of F (failed) unless he is doing passing work in that course at the date of official withdrawal.

Medical and Physical Examination. Each semester, before registering, all students must clear their health records through the Physical Education office. New† or re-entering‡ undergraduate and full-time graduate students (those taking 10 units or more of work), students living in residence halls, and students registering in physical education activity courses are required to pass a health examination given under the direction of the University Health Service (Department of Physical Education). This examination is a part of the registration procedure. The University may, upon the recommendation of the [66]

†*New*: any student who has not previously registered at this University.

‡*Re-entering*: any student who is returning after an absence of one semester or more.

Grades, Probation, Examinations, Attendance 141

medical examiner, refuse registration to any entrant who is physically incapacitated for college work or whose health condition might be a menace to the health of other students.

GRADES, PROBATION AND DISQUALIFICATION, EXAMINATIONS AND ATTENDANCE

Grades

Scholarship Record. The significance of each of the several grades given, along with the marks, Iw, Ie, N, and W, is explained below:

A—Excellent.

B—Good.

C—Average.

D—Inferior.

F—Failed. This grade indicates that the student has failed at the end of the semester or has officially dropped the course while doing failing work after the end of the seventh week.

It is expected that the content elements of a course will be selected and organized so as to make it possible for approximately the middle half of a large class group to attain the degree of achievement represented by a C grade. In the several undergraduate departments the passing grades of undergraduate students should approximate the following distributions: (1) In upper division courses, A's, 10 per cent; B's, 30 per cent; C's, 50 per cent; D's, 10 per cent. (2) In lower division courses, A's, 5 per cent; B's, 25 per cent; C's, 50 per cent; D's, 20 per cent.

Iw—Incomplete work. Work satisfactory and of passing quality, but not fully completed because of serious

illness or for other excellent reasons reported by the student to the instructor before the close of the session. Additional work required to make up the deficiency, special examination not required in order to earn a passing grade in the course. The work should be completed during the succeeding semester. The deficiency must be removed within one calendar year, or the course must be repeated to secure credit therein.†

Ie—Incomplete. A shortage including final examination. Work satisfactory and of passing quality, but not fully completed because of serious illness or for other excellent reasons reported by the student to the instructor before the close of [67]

142 *Grades, Probation, Examinations, Attendance*

the session. Special final examination required. The examination must be taken at a regular period of special examinations, as announced in the University Calendar, or, subject to approval of the instructor, at any regular final examination period in the course in which the Ie was earned. The examination should be taken during the succeeding semester, and the deficiency must be removed within one calendar year to secure credit in the course.†

N—Undetermined. Grade undertermined in a continuation course, but to be determined by the final grade in the last semester of this course as a whole. The use of this grade is restricted to the School of Law and the School of Medicine.

†If the work required for the completion of Iw or Ie above is properly authorized by the Registrar and the Comptroller and is completed satisfactorily within one calendar year, any of the passing grades may be assigned as determined by the instructor; otherwise, these marks are entered as X on the permanent record, with 0 grade-point credit.

†See footnote, page 141.

W—Withdrawn. Course officially dropped before the end of the seventh week of the semester, or after that period provided the work is of passing grade at the time of official withdrawal and there are valid reasons, such as serious illness, for the withdrawal. The course must be repeated if credit is desired therein.

Grade Points. A system of grade points is used to determine a student's general average or standing. Each student normally completes a certain number of units and secures a number of grade points each semester. Grade points are a measure of the quality of the work done in a course, as units are a measure of the amount.

Grade points are assigned to grades as follows:

- 3 grade points for each unit of grade A.
- 2 grade points for each unit of grade B.
- 1 grade point for each unit of grade C.
- 0 grade points for each unit of grade D, or for the marks Iw or Ie.
- 1 grade point for each unit of grade F.

Scholarship Average. The scholarship average of a student is equal to the total number of grade points divided by the total number of units attempted. The units attempted shall be units of record which bear the grades A, B, C, D, F, or the marks Iw or Ie.

Part-Semester Reports. At the end of the fifth week and again at the end of the tenth week of each semester each student doing unsatisfactory work in any course is notified of this fact by a card, which he is to take to the instructor and to his faculty adviser for consultation concerning means of improvement.

Semester Reports. At the end of each semester the student may secure his record in all courses taken during that period by filing at the Registrar's Office a self-addressed envelope for mailing the report. [68]

Grades, Probation, Examinations, Attendance 143

Transcripts of Records. One complete transcript of record is furnished the student without charge; for each additional transcript a fee of one dollar is required with the application in advance. The application for the transcript of record must be made by the student himself, on the regular form supplied by the Registrar. In order to avoid possible errors, it should show the first date of attendance, the last date of attendance, the sessions in which the work was taken, and each name of the applicant in full, with the address as it was reported to the office when the work was taken. It should be filled out and filed at the Office of the Registrar at least two weeks before the transcript is needed. No transcript will be supplied for college work taken in other institutions.

Probation and Disqualification

The following regulations governing probation and disqualification for unsatisfactory scholarship apply to undergraduate students, both regular and special, registered for 6 or more units of credit in any division of the University, except the College of Dentistry, School of Medicine, School of Law, University Junior-College, Graduate School, and the several graduate professional schools.

Notice of Unsatisfactory Scholarship. After the tenth week in each term, the scholarship records of all students will be reviewed by the Student Scholarship Committee through its subcommittee, the Committee on Probationary Students. If a record is found to be unsatisfactory, notice will be sent by the Committee to the student and his parent. The notice will state that the student's record will be reviewed and his status determined before his reregistration in the University. This notice will be sent to a student whose previous term average falls below 0.5,

or who in the ten weeks' report receives unsatisfactory grades in half or more of the units on his registered program, or who is otherwise found to be seriously deficient in his academic achievement.

Probation. A student not already on probation will be placed on probation if his term average falls below 0.5 after he has been notified of his unsatisfactory scholarship. A student registered on probation must carry a program of at least 12 units in a regular term. A student on probation will be removed from probationary status if during a term of probation he makes a term average of 1.0 or higher.

Disqualification. A student will be subject to disqualification (1) if, after having been notified of his unsatisfactory scholarship, his term average falls below 0.0, or (2) if while on probation he fails to attain a term average of 0.5, or (3) if he has not removed his probationary status in two successive terms of probation. [69]

144 *Grades, Probation, Examinations, Attendance*

Regulations for extracurricular activities will be found on page 98.

Examinations

Regular Examinations are held at the close of each semester and at intervals during the semester in all studies pursued in classes. The mark for a course is based upon recitations, papers, and examinations. A 2-hour examination in general is counted as not more than one fourth of the course in the determination of the course grade.

No undergraduate student is allowed to omit any final examination, and no undergraduate student is allowed to anticipate any final examination. The instructor is not authorized to make such adjustments.

The Committee on Special Examinations is responsible for the conduct of final examinations.

Special Examinations. A fee of three dollars per examination is charged for the following special examinations.†

1. Examinations for college credit on work for which acceptable credentials cannot be supplied.
2. Examinations to make up grades of 1e.
3. Examinations given outside regular examination schedule.

The dates of these special examinations are announced in the calendar.

Attendance

Students are expected to attend all the exercises of the courses for which they are registered.

Absence from several meetings of a course operates to limit a student's achievement and in most cases results in a lower grade, since such absence makes impossible the mastery of significant units of the course. As a result of excessive absence, a student may be required by the Scholarship Committee to withdraw from a course or from the University in accordance with the University rules.

These attendance regulations apply to all schools and colleges with the exception of the College of Dentistry, the Graduate School, School of Law, School of Medicine, Summer School, and University College.

In the School of Law a deduction of one unit of credit and one grade point will be made for each sixteen absences per semester, assembled from all work being taken by the student during that time. If the total number of absences in any one [70]

†No student shall be admitted to such examination except on receipt of an authorization signed by the Registrar and the Office of the Comptroller.

University Residences 145

course amounts to one fourth, or more, of the total class meetings of that course, the student will automatically be dropped from the course.

TUITION AND FEES

The schools and colleges in the University (with the exception of Civic Center and University College, which are on the quarter basis) operate on the basis of three terms of 16 weeks each a year. Tuition and fees are payable at the beginning of each term (semester) or quarter. A normal course in most schools and colleges consists of 12 to 16 units a term; Engineering students usually carry 18 units a term. See the individual bulletins for detailed information regarding individual instruction in Music and laboratory and other fees.

Tuition per term (semester):

All schools and colleges except Dentistry, Law, Medicine, and Religion (Graduate School), per unit	\$ 10.00
College of Dentistry.....	see bulletin.
School of Law (10-15 units).....	160.00
*School of Medicine	250.00
Graduate School of Religion.....	25.00

Registration fee, per term (semester):

For 10 or more units.....	10.00
For less than 10 units.....	5.00
Civic Center and University College.....	\$3.00-5.00

Library fee, per term (semester):

For 10 or more units, except Law and Medicine	5.00
For 10 or more units, Law and Medicine....	10.00
For less than 10 units, Law and Medicine....	5.00

*Graduate students taking work in the School of Medicine are charged \$16.00 a unit.

UNIVERSITY RESIDENCES

Room and board are provided at the lowest reasonable cost in the residence halls for women. All rooms are engaged by the term and may not be vacated within that time. Residence hall fees are payable by the term and may be paid in advance or in three equal payments—the first on the day of registration, the second at the beginning of the fifth week of the term, and the third at the beginning of the ninth week. The rates range from \$185 to \$240 a term and include breakfasts and dinners seven days a week; no meals are served during Thanksgiving, Christmas, and Easter recesses, or between terms. Rates are subject to change if conditions demand. [71]

146

Bureau of Employment

A deposit of \$10 (not refundable) should accompany application for rooms. This deposit is deducted from the amount payable at registration. Students residing in the residence halls must make a breakage deposit of \$10. After the cost of damages is deducted, the balance is refunded at the end of the year.

All inquiries concerning housing and requests for reservations at the women's residence halls should be addressed to the Manager, Residence Halls, The University of Southern California.

The University reserves the right to change without notice any of the rates printed in this bulletin.

STUDENT RESIDENCE

All undergraduate students not living at home or in fraternity or sorority houses or in the residence halls must choose accommodations in houses approved by the University.

Lists of approved houses will be given out at registration, or earlier, through the office of the Dean of Women or the Counselor of Men.

Students may not change residence during any semester unless under exceptional circumstances and with the approval in advance of the Dean of Women or the Counselor of Men.

No undergraduates may live in apartments, except by special permission of the Dean of Women or the Counselor of Men.

All undergraduate students must have their housing arrangements approved in the office of the Dean of Women or the Counselor of Men.

BUREAU OF EMPLOYMENT

The University maintains a Bureau of Employment to assist students and graduates in securing part-time and full-time employment. It is one of the major objectives of the Bureau to act as a coordinating office between the University and business and industry. Large numbers of business organizations are sending their personnel representatives to the University every year in order to recruit new employees for their organizations.

Because of the location of the University in the metropolitan area of Los Angeles, there are numerous opportunities in practically all fields of business for students in school who desire part-time employment. Often it is possible to place students in part-time or summer work so that they may get experience in work related to their studies.

In cooperation with the Counselor of Men and the deans of the various professional schools on the campus, the Bureau of Employment is prepared to offer information about voca- [72]

Bureau of Teacher Placement

147

tions which may be of value in assisting the student to plan his university work with definite employment objectives in mind. The Bureau is able to assist students in making contacts with successful men and women in business who can give further advice regarding the occupations with which they are acquainted.

Those who are interested in securing the services of the Bureau should make application in person at the office, Room 208, Student Union. A fee of one dollar is charged for registration for a full-time position. This fee covers the collecting of references and recommendations, and the development of a personnel record for each applicant.

Since tuition and fees are approximately \$190 a term and living expenses average \$55 monthly, the University does not encourage students to attempt to earn all of their expenses while attending the University. The student should have some funds or an assured income to take care of at least part of his expenses.

BUREAU OF TEACHER PLACEMENT

A placement office is maintained by the University to assist students and graduates of the University in obtaining positions in the teaching profession. Complete records are kept of the achievements, experience, and personal qualifications of each candidate for a position. Copies of these records will be mailed to school officials at their request or at the request of the candidates concerned. Officials seeking teachers should be explicit in their request, stating the nature of the work to be done, the length of the school year, the approximate salary offered, the approximate cost of board, and the time when the engagement begins. When a notice of a vacancy is

received, the Director of Teacher Placement will recommend the best available person for the position. The University reserves the right of refusing to extend its cooperation to students who apply for positions for which they are manifestly unqualified.

Blanks for registration may be obtained from the Director of Teacher Placement. Registration must be renewed yearly, preferably during February or March. A fee of five dollars is charged for each year of active service.

Communications should be addressed to the Director, Bureau of Teacher Placement, Room 222, Student Union, The University of Southern California, Los Angeles 7. [73]

EXHIBIT B

To Affidavit of Hugh C. Willett
Excerpts from University of Southern California
"Circular of Information"
1945-1946

Degrees and Certificates

129

Master of Science in Chemical Engineering.
Master of Science in Civil Engineering.
Master of Science in Electrical Engineering.
Master of Science in Mechanical Engineering.
Master of Science in Petroleum Engineering.
Chemical Engineer.
Civil Engineer.
Electrical Engineer.
Mechanical Engineer.
Petroleum Engineer.
Master of Science in Pharmacy.

Master of Science in Public Administration.

Master of Business Administration.

Master of Architecture.

Master of Fine Arts.

Master of Music.

Master of Science in Education.

Master of Education.

Master of Laws.

Master of Foreign Service.

Master of Theology.

Master of Social Work.

Master of Dental Science in Orthodontics.

Doctor of Philosophy.

Doctor of Education.

Doctor of Theology.

Recommendations For Teachers' Credentials

The School of Education of the University has been accredited for the training of teachers and has been authorized to issue recommendations to students who comply with the general requirements of the State Board of Education for the following credentials: Administration; Supervision; Junior College; General Secondary; General Junior High School; General Elementary; Kindergarten-Primary; Child Welfare and Supervision of Attendance; Special Secondary in Art, Business Education, Music, Physical Education, Continuation Education, Librarianship.

ADMISSION

Application For Admission

Application for admission to the University may be made by mail or in person at the University Office of Admissions. [74]

Application forms will be furnished on request. Students who seek admission will please request the registrars of institutions previously attended to forward official transcripts of record direct to the Office of Admissions. The University does not undertake to collect the credentials of prospective students.

Certificates of permission to register will be issued to applicants whose credentials are found to be acceptable. Other applicants will be advised as to conditions to be met for admission. Applications and high school records should be filed as early as possible to avoid delay at registration.

Directions to Applicant for Admission to the University

Before your eligibility for admission can be determined, it is necessary for the Office of Admissions to receive your formal application for admission, an official certificate of your high school work, and official transcripts of record from all collegiate institutions which you may have attended. The following procedure is recommended:

1. Send for the bulletin you desire and an application blank for admission.
2. Complete the application for admission and mail it to the Office of Admissions.
3. Request the principal of the high school from which you graduated and the registrars of colleges you have attended to send official transcripts of your record to the Office of Admissions.
4. Address to the Office of Admissions any questions you may have concerning your admission or the standing you will be allowed in the University.

5. If you are accepted for admission to the University, you will receive an Admission Credit Summary. Preserve this credit summary, which is also your permit to register, and present it at the place of registration.

6. The Scholastic Aptitude Test is required of all students entering the freshman class or the University Junior College.

Admission By Certificate From High School

General Statement. Graduates of accredited senior high schools, or other accredited secondary schools, who give satisfactory evidence of good character and intellectual promise and who meet the following unit and grade requirements are eligible for admission to freshman standing. The admission of any student is tentative, pending the report of the University medical examiners.

Unit Requirement: 15 units of credit in subjects accepted for graduation from high school, including (a) 3 units of [75]

144

Registration

ment from the Office of Admissions regarding the availability of credit for such work at this University. In no case will more than 8 semester units of graduate work be accepted by transfer toward the master's degree.

5. Exceptions. In exceptional cases—falling outside the usual rules and practices concerning admissions—graduates of nonaccredited institutions or applicants adjudged to have the full equivalent of the standard bachelor's degree may be admitted to graduate studies after joint consideration by the Office of Admissions and the Dean of the Graduate School. In such cases full graduate standing is reached only by action of the Council on Graduate Study and Research.

School of Research

Membership in the School of Research consists of five groups of persons, as follows: *Faculty*: (1) members of professorial rank whose duties involve supervision of graduate research; (2) others of rank of instructor or above, actively engaged in research, who have been recommended by their department heads and admitted by the Council. *Student*: including (1) every graduate on being formally admitted to candidacy for the degree of Doctor of Philosophy, who becomes *ipso facto* a member of the School of Research; and (2) other graduate students holding the master's degree (or equivalent) who have demonstrated undoubted capacity for research and who, on recommendation of their department heads, have been elected by the Council or Graduate Study and Research. *By Courtesy*: scholars and scientists, holding the Ph.D. (or equivalent), desiring to pursue research, who on recommendation of the Director have been admitted to membership by vote of the Council Members by courtesy are released from all tuition charges and are afforded free auditing and library privileges.

REGISTRATION

Details of the registration procedure are contained in a special bulletin issued by the Registrar and distributed to students on the days of registration. The tests and examinations listed below are a part of registration procedure.

No student may attend classes without having presented either the class admission card or a special permit from the President.

Every student is required to register in person before entering upon his college work. The days and places of

registration for each semester are announced in advance, and any student not registered before the first day of instruction is subject to a fee of three dollars for late registration. If registration is delayed until the first day of the second week of instruction, this fee is increased to five dollars and the student is subject [76]

Registration

145

to a reduction in the number of units of work he is permitted to carry.

Before registering, every student entering the University for the first time must have from the Office of Admissions a statement that his entrance credits are acceptable or a statement of the conditions under which he is permitted to register.

A Board of Faculty Advisers is appointed by the President to direct the registration of all students.

Lower division students will be assigned to faculty advisers, with whom they must confer in the arranging of programs and to whom they may go for advice in any problems connected with college life.

Upper division students are required to confer with and to have their study programs approved by the professors of their major subjects, who are their faculty advisers during the junior and senior years.

All foreign students who are admitted to the United States on a nonquota immigrant basis must take at least 12 units a semester, to satisfy the stipulation of their being admitted for study at an educational institution.

Subject requirements on course and the work necessary for completion of subject shortages for admission must have precedence in the registration program of every student for every session until all such shortages are fully

removed. (Although it is essential for a student to remove admission shortages in all subjects as soon as possible, he will not be required, prior to his junior year, to register for more than one such subject at a time.)

A student engaging in extracurricular activity or outside work that limits his time and exhausts his energy is subject to a limitation in the number of units he may carry in regular college work.

No student may register for more than 18 hours except as provided by the program of requirements for his degree or as approved by special action of the Student Scholarship Committee. This permission is not granted to any student in his first semester of residence or to any student who is on warning or probation.

Students who are planning to return to college after a semester's absence should notify the Office of the Registrar, in writing, at least two weeks before the registration period.

Students should arrange for all necessary adjustments in their courses before registering for the last 30 units required for the degree, and those expecting to receive degrees at the end of any session should file written notice at the Office of the Registrar at the beginning of the session.

Changes in Registration. No course may be added and no course may be dropped except through the Registrar's Office [77]

146 *Grades, Probation, Examinations, Attendance*

on blanks specifically provided. The student must secure the written approval of his faculty adviser before any change will be made at the Registrar's Office. Any change in a student's program after the first seven calendar days

of the semester will involve a fee of two dollars. Students are advised to make no changes in registration after the close of that period. Students are not permitted to enter new courses after the close of the second week except for valid reasons and with the approval of the Student Scholarship Committee.

Withdrawal from a Course. A student is held responsible for all courses in which he registers unless he officially withdraws from a course. A student who withdraws from a course after the end of the seventh week of the semester will be assigned a grade of F (failed) unless he is doing passing work in that course at the date of official withdrawal.

Medical and Physical Examination. Each semester, before registering, all students must clear their health records through the Physical Education office. New† or re-entering‡ undergraduate students registering in physical education activity courses are required to take a health examination given under the direction of the University Health Service (Department of Physical Education). This examination is a part of the registration procedure. The University may, upon the recommendation of the medical examiner, refuse registration to any entrant who is physically incapacitated for college work or whose health condition might be a menace to the health of other students.

†*New*: any student who has not previously registered at this University.

‡*Re-entering*: any student who is returning after an absence of two semesters or more.

GRADES, PROBATION AND DISQUALIFICATION, EXAMINATIONS, AND ATTENDANCE

Grades

Scholarship Record. The significance of each of the several grades given, along with the marks Iw, Ie, N, and W, is explained below:

A—Excellent.

B—Good.

C—Average.

D—Inferior.

F—Failed. This grade indicates that the student has failed at the end of the semester or has officially dropped the course while doing failing work after end of the seventh week.

It is expected that the content elements of a course will be [78]

148 *Grades, Probation, Examinations, Attendance*

measure of the quality of the work done in a course, as units are a measure of the amount.

Grade points are assigned to grades as follows:

3 grade points for each unit of grade A.

2 grade points for each unit of grade B.

1 grade point for each unit of grade C.

0 grade points for each unit of grade D, or for the marks Iw or Ie.

—1 grade point for each unit of grade F.

Scholarship Average. The scholarship average of a student is equal to the total number of grade points divided by the total number of units attempted. The units

attempted shall be units of record which bear the grades A, B, C, D, F, or the marks Iw or Ie.

Part-Semester Reports. At the end of the fifth week and again at the end of the tenth week of each semester each student doing unsatisfactory work in any course is notified of this fact by a card, which he is to take to the instructor and to his faculty adviser for consultation concerning means of improvement.

Semester Reports. At the end of each semester the student may secure his record in all courses taken during that period by filing at the Registrar's Office a self-addressed envelope for mailing the report.

Transcripts of Records. One complete transcript of record is furnished the student without charge; for each additional transcript a fee of one dollar is required with the application in advance. The application for the transcript of record must be made by the student himself, on the regular form supplied by the Registrar. To avoid possible errors, it should show the first and last dates of attendance and each name in full. It should be filled out and filed at the Office of the Registrar at least two weeks before the transcript is needed. No transcript will be supplied for college work taken in other institutions.

Probation and Disqualification

The following regulations governing probation and disqualification for unsatisfactory scholarship apply to undergraduate students, both regular and special, registered for 6 or more units of credit in any division of the University, except the College of Dentistry, School of Medicine,

School of Law, University Junior College, Graduate School, and the several graduate professional schools.

Notice of Unsatisfactory Scholarship. After the tenth week in each term, the scholarship records of all students will be reviewed by the Student Scholarship Committee through its subcommittee, the Committee on Probationary Students. If [79]

Grades, Probation, Examinations, Attendance 149

a record is found to be unsatisfactory, notice will be sent by the Committee to the student and his parent. The notice will state that the student's record will be reviewed and his status determined before his reregistration in the University. This notice will be sent to a student whose previous term average falls below 0.5, or who in the ten weeks' report receives unsatisfactory grades in half or more of the units on his registered program, or who is otherwise found to be seriously deficient in his academic achievement.

Probation. A student not already on probation will be placed on probation if his term average falls below 0.5 after he has been notified of his unsatisfactory scholarship. A student registered on probation must carry a program of at least 12 units in a regular term. A student on probation will be removed from probationary status if during a term of probation he makes a term average of 1.0 or higher.

Disqualification. A student will be subject to disqualification (1) if, after having been notified of his unsatisfactory scholarship, his term average falls below 0.0, or

(2) if while on probation he fails to attain a term average of 0.5, or (3) if he has not removed his probationary status in two successive terms of probation.

Regultions for extracurricular activities will be found on page 104.

Examinations

Regular Examinations are held at the close of each semester and at intervals during the semester in all studies pursued in classes. The mark for a course is based upon recitations, papers, and examinations. A 2-hour examination in general is counted as not more than one fourth of the course in the determination of the course grade.

No undergraduate student is allowed to omit any final examination, and no undergraduate student is allowed to anticipate any final examination. The instructor is not authorized to make such adjustments.

The Committee on Special Examinations is responsible for the conduct of final examinations.

Special Examinations. A fee of three dollars per examination is charged for the following special examinations.†

1. Examinations for college credit on work for which acceptable credentials cannot be supplied.
2. Examinations to make up grades of Ie.
3. Examinations given outside regular examination schedule.

The dates of these special examinations are announced in the calendar. [80]

†No student shall be admitted to such examination except on receipt of an authorization signed by the Registrar and the Office of the Comptroller.

Attendance

Students are expected to attend all the exercises of the courses for which they are registered.

Absence from several meetings of a course operates to limit a student's achievement and in most cases results in a lower grade, since such absence makes impossible the mastery of significant units of the course. As a result of excessive absence, a student may be required by the Scholarship Committee to withdraw from a course or from the University in accordance with the University rules.

These attendance regulations apply to all schools and colleges with the exception of the College of Dentistry, the Graduate School, School of Law, School of Medicine, Summer School, and University College.

In the School of Law a deduction of one unit of credit and one grade point will be made for each sixteen absences per semester, assembled from all work being taken by the student during that time. If the total number of absences in any one course amounts to one fourth, or more, of the total class meetings of that course, the student will automatically be dropped from the course.

TUITION AND FEES

The schools and colleges in the University (with the exception of Civic Center and University College, where most of the courses are on the quarter basis) operate on the basis of three terms of 16 weeks each a year. Tuition and fees are payable at the beginning of each term (semester) or quarter. A normal course in most schools and colleges consists of 12 to 16 units a term: Engineer-

ing students usually carry 18 units a term. See the individual bulletins for detailed information regarding individual instruction in Music and laboratory and other fees.

Tuition per term (semester):

All schools and colleges except Dentistry, Law, Medicine, and Religion (Graduate School), per unit	\$ 11.00
College of Dentistry.....	see bulletin.
School of Law (10-15 units).....	190.00
*School of Medicine.....	250.00
Graduate School of Religion.....	25.00

Registration fee, per term (semester):

For 10 or more units.....	10.00
For less than 10 units.....	5.00
Civic Center and University College.....	\$3.00-5.00 [81]

Bureau of Employment 151

Library fee, per term (semester):

For 19 or more units, except Law and Medicine	\$ 5.00
For 10 or more units, Law and Medicine....	10.00
For less than 10 units, Law and Medicine....	5.00

UNIVERSITY RESIDENCES

Rooms are provided at the lowest reasonable cost in the residence halls for students. All rooms are engaged by the term and may not be vacated within that time. Residence hall fees are payable by the term and may be paid

*Graduate students taking work in the School of Medicine are charged \$16.00 a unit.

in advance or in three payments—the first on the day of registration, the second at the beginning of the fifth week of the term, and the third at the beginning of the ninth week. The rates range from \$85 to \$100 a term. Rates are subject to change if conditions demand.

A deposit of \$10 (not refundable) should accompany application for rooms. This deposit is deducted from the amount payable at registration. Students residing in the residence halls must make a breakage deposit of \$10. After the cost of damages is deducted, the balance is refunded at the end of the year.

All inquiries concerning housing and requests for reservations at the women's residence halls should be addressed to the Dean of Women, The University of Southern California.

The University reserves the right to change without notice any of the rates printed in this bulletin.

STUDENT RESIDENCE

All undergraduate students not living at home or in fraternity or sorority houses or in the residence halls must choose accommodations in houses approved by the University.

Students may not change residence during any semester unless under exceptional circumstances and with the approval in advance of the Dean of Women or the Dean of Men.

No undergraduates may live in apartments, except by special permission of the Dean of Women or the Dean of Men.

All undergraduate students must have their housing arrangements approved in the office of the Dean of Women or the Dean of Men.

BUREAU OF EMPLOYMENT

The University maintains a Bureau of Employment to assist students and graduates in securing part-time and full-time employment. It is one of the major objectives of the Bureau to act as a coordinating office between the University and business and industry. Large numbers of business organizations are sending their personnel representatives to the Uni- [82]

EXHIBIT C

To Affidavit of Hugh C. Willett
Excerpts from University of Southern California.
"Circular of Information"
1946-1947

148

Admission

Mechanical Engineer.
Petroleum Engineer.
Master of Science in Pharmacy.
Master of Science in Public Administration.
Master of Business Administration.
Master of Architecture.
Master of Fine Arts.
Master of Music.
Master of Science in Education.
Master of Education.
Master of Laws.
Master of Foreign Service.
Master of Theology.
Master of Social Work.
Master of Dental Science in Orthodontics.
Doctor of Philosophy.
Doctor of Education.
Doctor of Theology.

Recommendations For Teachers' Credentials

The School of Education of the University has been accredited for the training of teachers and has been authorized to issue recommendations to students who comply with the general requirements of the State Board of Education for the following credentials: Administration and Supervision; Junior College; General Secondary; General Junior High School; General Elementary; Kindergarten-Primary; Attendance Officer; Special Secondary in Art, Business Education, Music, Physical Education, Librarianship; Special Secondary for Teaching Lip Reading to the Hard-of-Hearing Child; Special Secondary for Teaching Lip Reading to the Hard-of-Hearing Adult; and Special in Correction of Speech Defects.

ADMISSION

Application For Admission

Application for admission to the University may be made by mail or in person at the University Office of Admissions. Application forms will be furnished on request. Students who seek admission will please request the registrars of institutions previously attended to forward official transcripts of record direct to the Office of Admissions. The University does not undertake to collect the credentials of prospective students.

Certificates of permission to register will be issued to applicants whose credentials are found to be acceptable. Applications and high school records should be filed as early as possible to avoid delay at registration. [83]

Admission

149

Directions to Applicant for Admission to the University

Before your eligibility for admission can be determined, it is necessary for the Office of Admissions to receive

your formal application for admission, an official certificate of your high school work, and official transcripts of record from all collegiate institutions you have attended. The following procedure is recommended:

1. Send for the bulletin you desire and an application blank for admission.
2. Complete the application for admission and mail it to the Office of Admissions.
3. Request the principal of the high school from which you graduated and the registrars of colleges you have attended to send official transcripts of your record to the Office of Admissions.
4. Address to the Office of Admissions any questions you may have concerning your admission or the standing you will be allowed in the University.
5. If you are accepted for admission to the University, you will receive a Permit to Register. Preserve this permit and present it at the place of registration.
6. The Scholastic Aptitude Test is required of all students entering the freshman class.

Admission By Certificate From High School

General Statement. Graduates of accredited senior high schools, or other accredited secondary schools, who give satisfactory evidence of good character and intellectual promise and who meet the following unit and grade requirements are eligible for admission to freshman standing. The admission of any student is tentative, pending the report of the University medical examiners.

Unit Requirement: 15 units of credit in subjects accepted for graduation from high school, including (a) 3 units of English; (b) 7 other units in academic sub-

jects;¹ (c) 5 units in either academic or nonacademic subjects.

Although a student who is otherwise eligible will be accepted for admission if his 15 entrance units include 3 of English and 7 other units in academic subjects, it will be to his advantage to present for admission 2 units of a foreign language, 1 unit of history or other social science, 1 unit of a natural science with laboratory, 1 unit of algebra, and 1 unit

[84]

160

Admission

Graduate School of Religion

Graduation from an approved college or the completion of 124 semester units of work in the College of Letters, Arts, and Sciences, or in an accredited standard college or university, is required for admission to the Graduate School of Religion.

Undergraduate courses in Religion are offered in the Department of Religion in the College of Letters, Arts, and Sciences.

Graduate School of Social Work

A Bachelor of Arts degree, or its equivalent, from an accredited college or university is required for admission to graduate professional standing in the Graduate School of Social Work.

Students seeking admission to the Graduate School of Social Work must first file their credentials at the Office

¹For admission purposes the following subjects are considered to be *academic*: English, foreign languages, history, mathematics, sciences, social sciences. For admission to the College of Commerce and Business Administration only, the following also are considered to be *academic*: economic geography, economic history, business correspondence, business arithmetic, business law, and business organization.

Fewer than 7 additional units in academic subjects may be accepted in the case of a student who graduates in the highest tenth of his class, and who is recommended for college admission by his principal. Each case will be considered on its individual merits.

of Admissions for analysis and evaluation. It is strongly recommended that the application and credentials be filed at least two months before the proposed date of registration.

An applicant who has been found to be eligible for admission may then apply for enrollment in the Graduate School of Social Work at the office of the School. The Secretary to the Dean of the School will furnish the necessary forms on request.

The Graduate School

1. Application. Application for admission to the Graduate School is made at the Office of Admissions, where the applicant's credentials are filed and evaluated. To insure early consideration credentials should be filed at least one month previous to the first day of official registration.

2. Credentials. The student's credentials should include certified transcripts from the records of institutions previously attended, listing all preceding courses, with their unit values and the grades attained.

3. Requirements. A Bachelor of Arts degree, or its equivalent, from an accredited college or university admits the holder to the Graduate School. Admission to candidacy for a graduate degree, under the jurisdiction of the Graduate School, is a separate and subsequent step, to be initiated by the student himself at the office of the Graduate School.

4. Transfers. Students who present evidence of having completed graduate work in other institutions will be given a statement from the Office of Admissions regarding the availability of credit for such work at this University. In no case will more than 8 semester units of graduate work be accepted by transfer toward the master's degree. [85]

Registration

161

5. Exceptions. In exceptional cases—falling outside the usual rules and practices concerning admissions—graduates of nonaccredited institutions or applicants adjudged to have the full equivalent of the standard bachelor's degree may be admitted to graduate studies after joint consideration by the Office of Admissions and the Dean of the Graduate School. In such cases full graduate standing is reached only by action of the Council on Graduate Study and Research.

School of Research

Membership in the School of Research consists of five groups of persons, as follows: *Faculty*: (1) members of professorial rank whose duties involve supervision of graduate research; (2) others of rank of instructor or above, actively engaged in research, who have been recommended by their department heads and admitted by the Council. *Students*: including (1) every graduate on being formally admitted to candidacy for the degree of Doctor of Philosophy, who becomes *ipso facto* a member of the School of Research; and (2) other graduate students holding the master's degree (or equivalent) who have demonstrated undoubted capacity for research and who, on recommendation of their department heads, have been elected by the Council on Graduate Study and Research. *By Courtesy*: scholars and scientists, holding the Ph.D. (or equivalent), desiring to pursue research, who on recommendation of the Director have been admitted to membership by vote of the Council Members by courtesy are released from all tuition charges and are afforded free auditing and library privileges.

REGISTRATION

Details of the registration procedure are contained in a special bulletin issued by the Registrar and distributed to students on the days of registration. The tests and examinations listed below are a part of registration procedure.

No student may attend classes without having presented either the class admission card or a special permit from the President.

Every student is required to register in person before entering upon his college work. The days and places of registration for each semester are announced in advance, and any student not registered before the first day of instruction is subject to a fee of five dollars for late registration. If registration is delayed until the first day of the second week of instruction, this fee is increased to ten dollars; if delayed until the third week of instruction, the fee is twenty dollars and the student is subject to a reduction in the number of units of work he is permitted to carry. [86]

162

Registration

Before registering, every student entering the University for the first time must have from the Office of Admissions a statement that his entrance credits are acceptable or a statement of the conditions under which he is permitted to register.

All students have access to faculty guidance and advice through the offices of the deans or directors of the divisions in which they are registered.

Upper division students are required to confer with and to have their study programs approved by the pro-

fessors of their major subjects, who are their faculty advisers during the junior and senior years.

All foreign students who are admitted to the United States on a nonquota immigrant basis must take at least 12 units a semester, to satisfy the stipulation of their being admitted for study at an educational institution.

Subject requirements on course and the work necessary for completion of subject shortages for admission must have precedence in the registration program of every student for every session until all such shortages are fully removed. (Although it is essential for a student to remove admission shortages in all subjects as soon as possible, he will not be required, prior to his junior year, to register for more than one subject at a time.)

A student engaging in extracurricular activity or outside work that limits his time and exhausts his energy is subject to a limitation in the number of units he may carry in regular college work.

No student may register for more than 16 hours except as provided by the program of requirements for his degree or as approved by special action of the Student Scholarship Committee. This permission is not granted to any student in his first semester of residence or to any student who is on warning or probation.

Students who are planning to return to college after a semester's absence should notify the Office of the Registrar, in writing, at least one month before the registration period.

Students should arrange for all necessary adjustments in their courses before registering for the last 30 units required for the degree, and those expecting to receive degrees at the end of any session should file written notice

at the Office of the Registrar at the beginning of the session.

Changes in Registration. No course may be added and no course may be dropped except through the Registrar's Office on blanks specifically provided. The student must secure the written approval of his dean or faculty adviser before any change will be made at the Registrar's Office. Any change [87]

Registration

163

in a student's program after the first seven calendar days of the semester will involve a fee of two dollars. Students are advised to make no changes in registration after the close of that period. Students are not permitted to enter new courses after the close of the second week except for valid reasons and with the approval of the Student Scholarship Committee.

Withdrawal from a Course. A student is held responsible for all courses in which he registers unless he officially withdraws from a course. A student who withdraws from a course after the end of the seventh week of the semester will be assigned a grade of F (failed) unless he is doing passing work in that course at the date of official withdrawal.

Medical and Physical Examination. Each semester, before registering, all students must secure health permits from the University Health Office of the Department of Physical Education. All new students registering for the first time at this university (for exemptions applying to veterans see below) are required to file completed Health Forms at registration. It is expected that the new student will have his examination made and his form completed by a physician of his own choice before he reports for

registration.¹ If he cannot secure this service before coming to the University, he may request an examination by a University physician.² Upon the recommendation of the medical examiner the University may refuse registration to any applicant who is physically incapable of college work or whose health condition may be a menace to other students.

A veteran who has been discharged from military service during the 12 months preceding registration will be required to file Part A (Health History) of the Health Form, but he will be permitted to offer in lieu of Parts B and C a copy of his discharge medical certificate (WDAGO Form 63-Army, or WDAGO Form 64-Air Corps, or NMS Form Y-Navy, Marine Corps, Coast Guard), or a written request from the University Veterans' Coordinator that the physical examination be postponed pending receipt of his certificate. [88]

166 *Grades, Probation, Examination, Attendance*

attendance and each name in full. It should be filled out and filed at the Office of the Registrar at least two weeks before the transcript is needed. No transcript will be supplied for college work taken in other institutions.

Probation and Disqualification

The following regulations governing probation and disqualification for unsatisfactory scholarship apply to undergraduate students, both regular and special, registered

¹The Health Form is mailed to new students by the Office of Admissions. The Form consists of three parts: Part A (Health History) is to be filled out and signed by the student, or, if he is a minor, by his parent or guardian; Part B (Physical Examination) and Part C (Physician's Recommendations) are to be filled out by the examining physician, who must be an M.D. registered in the state in which the examination is given.

²A fee of \$10 is charged for an examination by a University physician. Appointments must be made at the University Health Office, Room 110, Physical Education Building.

for 6 or more units of credit in any division of the University, except the College of Dentistry, School of Medicine, School of Law, Graduate School, and the several graduate professional schools.

Notice of Unsatisfactory Scholarship. After the tenth week in each term, the scholarship records of all students will be reviewed by the Student Scholarship Committee through its subcommittee, the Committee on Probationary Students. If a record is found to be unsatisfactory, notice will be sent by the Committee to the student and his parent. The notice will state that the student's record will be reviewed and his status determined before his re-registration in the University. This notice will be sent to a student whose previous term average falls below 0.5, or who in the ten weeks' report receives unsatisfactory grades in half or more of the units on his registered program, or who is otherwise found to be seriously deficient in his academic achievement.

Probation. A student not already on probation will be placed on probation if his term average falls below 0.5 after he has been notified of his unsatisfactory scholarship. A student registered on probation must carry a program of at least 12 units in a regular term. A student on probation will be removed from probationary status if during a term of probation he makes a term average of 1.0 or higher.

Disqualification. A student will be subject to disqualification (1) if, after having been notified of his unsatisfactory scholarship, his term average falls below 0.0, or (2) if while on probation he fails to attain a term average of 0.5, or (3) if he has not removed his probationary status in two successive terms of probation.

Regulations for extracurricular activities will be found on page 123.

Examinations

Regular Examinations are held at the close of each semester and at intervals during the semester in all studies pursued in classes. The mark for a course is based upon recitations, papers, and examinations. A 2-hour examination in general is counted as not more than one fourth of the course in the determination of the course grade. [89]

Tuition and Fees

167

No undergraduate student is allowed to omit any final examination, and no undergraduate student is allowed to anticipate any final examination. The instructor is not authorized to make such adjustments.

The Committee on Special Examinations is responsible for the conduct of final examinations.

Special Examinations. A fee of three dollars per examination is charged for the following special examinations.†

1. Examinations for college credit on work for which acceptable credentials cannot be supplied.
2. Examinations to make up grades of Ie.
3. Examinations given outside regular examination schedule.

The dates of these special examinations are announced in the calendar.

†No student shall be admitted to such examination except on receipt of an authorization signed by the Registrar and the Business Office.

Attendance

Students are expected to attend all the exercises of the courses for which they are registered.

Absence from several meetings of a course operates to limit a student's achievement and in most cases results in a lower grade, since such absence makes impossible the mastery of significant units of the course. As a result of excessive absence, a student may be required by the Scholarship Committee to withdraw from a course or from the University in accordance with the University rules.

These attendance regulations apply to all schools and colleges with the exception of the College of Dentistry, the Graduate School, School of Law, School of Medicine, Summer Session, and University College.

In the School of Law a deduction of one unit of credit and one grade point will be made for each sixteen absences per semester, assembled from all work being taken by the student during that time. If the total number of absences in any one course amounts to one fourth, or more, of the total class meetings of that course, the student will automatically be dropped from the course.

TUITION AND FEES

Tuition and fees are payable at the beginning of each semester. A normal course in most schools and colleges consists of 12 to 16 units a term; Engineering students usually carry 18 units a term. See the individual bulletins for detailed information regarding individual instruction in Music and other fees. [90]

Tuition per semester:

All schools and colleges except Dentistry, Engineering, Law, Medicine, Pharmacy, and Graduate School of Religion, per unit.....\$ 14.00

College of Dentistry.....see bulletin.

College of Engineering..... 225.00

Less than 10 units, \$14 per unit

School of Law..... 225.00

Less than 10 units, \$20 per unit

School of Medicine..... 300.00

Less than 10 units, \$20 per unit

College of Pharmacy..... 225.00

Less than 10 units, \$14 per unit

Graduate School of Religion..... 40.00

Less than 10 units, \$30

Prepayments and breakage deposits

Acceptance fee (not refundable but applicable to tuition upon registration):

Architecture 25.00

Medicine 75.00

Breakage deposit

Chemistry or Pharmacy..... 10.00

Medicine 20.00

Special fees

Application 3.00

Binding Master's thesis..... 5.00

Bowling 14.00

Dissertation for Ph.D..... 50.00

Dissertation publication.....	50.00
Golf	10.00
Horseback riding.....	17.00
Medical examination for new students.....	10.00

¹Private music lessons:

2 half-hour lessons a week.....	100.00
1 half-hour lesson a week.....	55.00

[91]

Refunds

169

School of Medicine:

Hospital	\$ 2.50
Obstetrics	10.00
X-ray	2.00

Special examination..... 3.00

Transcript 1.00

Each student is entitled to one transcript without charge. This fee is charged for each additional copy of the student's transcript. No transcript will be supplied for college work taken in other institutions.

Penalty fees

Change of program after first week..... 2.00

Late registration:

First week.....	5.00
Second week.....	10.00
Third week.....	20.00

¹These rates apply only to students working for degrees. Rates for special students will be sent upon request.

Removal of incomplete examination and incomplete work.....	3.00
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Summer Session

Tuition rates will be announced later.

Auditors are not allowed to attend classes except on payment of the regular tuition rate.

Transient visitors may attend classes only on presentation of a card from the President of the University.

REFUNDS

Tuition is refundable only on written application to the Registrar and entirely at the option of the University. Any rebate allowed will be contingent upon the reason given in the application and will be computed in conformity with the schedule on file in the Business Office and as printed hereafter. Refunds will be computed as of the date on which application is made. Refunds involving complete cancellation of registration will be made by check no sooner than two weeks after the withdrawal date. No refunds will be made in the School of Medicine. In all other divisions no refunds will be made after the beginning of the ninth week. If withdrawal occurs within first 8 weeks, \$5.00 is retained on tuition for 1 to 4 units; \$10.00 on tuition for 5 to 9 units; \$20.00 on tuition for 10 or more units. In addition, one eighth of the balance of tuition is retained for each week of attendance. [92]

170

University Residences

AMOUNT OF REFUND

No. of Units	1st Week	2nd Week	3rd Week	4th Week	5th Week	6th Week	7th Week	8th Week
1	9.00	8.00	6.75	5.75	4.50	3.50	2.25	1.25
2	23.00	20.25	17.25	14.50	11.50	8.75	5.75	3.00
3	37.00	32.50	27.75	23.25	18.50	14.00	9.25	4.75
4	51.00	44.75	38.25	32.00	25.50	19.25	12.75	6.50
5	60.00	52.50	45.00	37.50	30.00	22.50	15.00	7.50
6	74.00	64.75	55.50	46.25	37.00	27.75	18.50	9.25
7	88.00	77.00	66.00	55.00	44.00	33.00	22.00	11.00
8	102.00	89.25	76.50	63.75	51.00	38.25	25.50	12.75
9	116.00	101.50	87.00	72.50	58.00	43.50	29.00	14.50
10	120.00	105.00	90.00	75.00	60.00	45.00	30.00	15.00
11	134.00	117.25	100.50	83.75	67.00	50.25	33.50	16.75
12	148.00	129.50	111.00	92.50	74.00	55.50	37.00	18.50
13	162.00	141.75	121.50	101.25	81.00	60.75	40.50	20.25
14	176.00	154.00	132.00	110.00	88.00	66.00	44.00	22.00
15	190.00	166.25	142.50	118.75	95.00	71.25	47.50	23.75
16	204.00	178.50	153.00	127.50	102.00	76.50	51.00	25.50
17	218.00	190.75	163.50	136.25	109.00	81.75	54.50	27.25
18	232.00	203.00	174.00	145.00	116.00	87.00	58.00	29.00
19	246.00	215.25	184.50	153.75	123.00	92.25	61.50	30.75
20	260.00	227.50	195.00	162.50	130.00	97.50	65.00	32.50
21	274.00	239.75	205.50	171.25	137.00	102.75	68.50	34.25
Engineering, Law, Pharmacy	205.00	179.50	153.75	128.25	102.50	77.00	51.25	25.75

The University reserves the right to change without notice any of the rates printed in this bulletin.

UNIVERSITY RESIDENCES

Rooms are provided in the residence halls for students at the lowest reasonable cost. All rooms are engaged by the semester and may not be vacated within that time. Residence hall fees are payable by the semester and may be paid in advance or in three payments—the first on the

day of registration, the second at the beginning of the fifth week of the semester, and the third at the beginning of the ninth week. The rates range from \$90 to \$100 a semester. Rates are subject to change if conditions demand.

A deposit of \$25 (not refundable unless the reservation is canceled sixty days before the opening of the semester) should accompany application for rooms. This deposit is deducted from the amount payable at registration. Students residing in the residence halls must make a breakage deposit of \$10. After the cost of damages is deducted, the balance is refunded at the end of the year.

All inquiries concerning housing and requests for reservations in the women's residence halls should be addressed to [93]

Bureau of Employment

171

the Dean of Women, and requests for reservations in the men's residence halls should be addressed to the Dean of Men, The University of Southern California.

STUDENT RESIDENCE

All undergraduate students not living at home or in fraternity or sorority houses or in the residence halls must choose accommodations in houses approved by the University.

Students may not change residence during any semester unless under exceptional circumstances and with the approval in advance of the Dean of Women or the Dean of Men.

No undergraduate students may live in apartments except by special permission of the Dean of Women or the Dean of Men.

All undergraduate students must have their housing arrangements approved in the office of the Dean of Women or the Dean of Men.

ESTIMATE OF STUDENT EXPENSE

Tuition (based on a 16-unit program), per semester	\$224.00
Books and supplies, per semester.....	\$30- 60.00
Room and board, per month.....	approximately 55.00
Purchase of a student activity book is optional.	
The charge is.....	12.50

BUREAU OF EMPLOYMENT

The University maintains a Bureau of Employment to assist students and graduates in securing part-time and full-time employment. It is one of the major objectives of the Bureau to act as a coordinating office between the University and business and industry. Large numbers of business organizations send their personnel representatives to the University every year in order to recruit new employees for their organizations.

Because of the location of the University in the metropolitan area of Los Angeles, there are numerous opportunities in practically all fields of business for students in school who desire part-time employment. Often it is possible to place students in part-time or summer work so that they may get experience in work related to their studies.

In cooperation with the Dean of Men and the deans of the various professional schools on the campus, the Bureau of Employment is prepared to offer vocational information which may be of value in assisting the student to plan his university work with definite employment objectives in mind. [94]

EXHIBIT D

To Affidavit of Hugh C. Willett
"Application for Admission" to University of
Southern California

(1) Have you listed under (B) on the reverse side all the institutions above high school grade at which you have ever registered? If you do not answer affirmatively, explain why

(2) Have you ever been dismissed from an educational institution because of unsatisfactory scholarship or unsatisfactory conduct? If so, please name the institution, give the date of dismissal, and state whether or not you are now eligible to return to that institution

(3) Are you now on probation or under any other similar penalty for unsatisfactory scholarship at any institution? If so, please name the institution and give a brief statement of the circumstances involved in your case.

(4) In what month and year did you cease attending the institution in which you were last registered? Account for your time briefly, but completely. If employed since that time, indicate the kind of work in which you have been engaged and give the name of your employer. Indicate each date by month and year

From _____ to _____
From _____ to _____
From _____ to _____

(5) Have you always used the name given under (A) on the reverse side? If not, please list here the names previously used, including variations in spelling, maiden name, etc.

(6) Have you taken the "Graduate Record Examination"? If so, when and where?

(F) Give name and address of nearest relative to whom communications may be addressed in case of need

(G) Please read carefully the following:

(1) You are to arrange for the forwarding of transcripts of record from institutions you have attended.

(2) All transcripts of records and credentials filed in support of this application become the property of the University and are not returnable to the applicant.

(3) No official statement concerning your admission and no evaluation of your credits will be given until this application and official transcripts of your previous high school and college work have been received at the Office of Admissions. To insure the evaluation of your credentials by the date of registration, have all documents in your case on file in that office as early as possible before the date on which you plan to enter the University. A student who has work in progress at another institution at the time application for admission is made should arrange for the filing of a transcript of record covering work completed up to the current semester. A supplementary transcript covering the work of the current semester may be filed later.

(4) If you do not receive by mail before the first day of registration a statement regarding your admission to the University, please call at the Office of Admissions, Room 259, Administration Building.

(H) I hereby certify that the information I submit in this application is complete and correct to the best of my knowledge and belief.

Date _____

Signature of Applicant _____

FEE FOR THE EVALUATION OF CREDENTIALS

(a) Applicants for admission to the University with advanced standing and others who request an evaluation of credentials, whether admission to the University is intended or not, are required to pay a fee of three dollars (\$3.00). This fee is payable at the time application for admission is made, and is not refundable. Make check or money order payable to The University of Southern California.

(b) The evaluation fee will not be charged applicants for admission to freshman standing or to the University Junior College on credentials from high schools only.

(c) Students who have been admitted to regular standing in any division of the University will not be charged the evaluation fee when transferring from one division of the University to another.

(d) Special students and students admitted without classification to University College, the Summer Session, or Community Service courses will be permitted to postpone the payment of the evaluation fee until admitted to regular standing.

(e) Students will not be charged a fee for the evaluation of Extension or Summer Session work taken while in regular standing in any division of the University.

(f) Students from foreign countries will be permitted to postpone the payment of the evaluation fee until they report in person at the Office of Admissions for formal admission to the University.

(g) Veterans under P.L. 16, P.L. 346, or State Veterans Educational Institute may apply for a refund of evaluation fee at the time of registration in the University.

EXHIBIT E

To Affidavit of Hugh C. Willett
 "Registration Permit" issued by University of
 Southern California

UNIVERSITY OF SOUTHERN CALIFORNIA
 REGISTRATION PERMIT

To:.....

This permit is your authority to register for the term
 beginning with
 the following classification:

(Division).....(Class).....

(Objective).....

*This permit must be presented at the time of registra-
 tion. Bring also to the registration your memorandum of
 high school and college work completed to date. An of-
 ficial Credit Summary will be mailed to you as soon as
 possible. It will not be necessary for you to call at the
 Office of Admissions regarding this matter. Keep us in-
 formed of any change in your address.*

*This permit must be filed with the Verification Clerk
 at the close of registration.*

Remarks:.....

.....

.....

(Signed) H. C. WILLETT

Director of Admissions and Registration

By.....

[Endorsed]: Filed Nov. 17, 1948. Edmund L. Smith,
 Clerk. [97]

EXHIBIT E

To Affidavit of Hugh C. Willett
 "Registration Permit" issued by University of
 Southern California

UNIVERSITY OF SOUTHERN CALIFORNIA
 REGISTRATION PERMIT

To:.....

This permit is your authority to register for the term
 beginning with
 the following classification:

(Division).....(Class).....

(Objective).....

*This permit must be presented at the time of registra-
 tion. Bring also to the registration your memorandum of
 high school and college work completed to date. An of-
 ficial Credit Summary will be mailed to you as soon as
 possible. It will not be necessary for you to call at the
 Office of Admissions regarding this matter. Keep us in-
 formed of any change in your address.*

*This permit must be filed with the Verification Clerk
 at the close of registration.*

Remarks :.....

.....

.....

(Signed) H. C. WILLETT

Director of Admissions and Registration

By.....

[Endorsed]: Filed Nov. 17, 1948. Edmund L. Smith,
 Clerk. [97]

[Title of District Court and Cause]

AFFIDAVIT OF ROBERT D. FISHER

State of California

County of Los Angeles—ss.

Robert D. Fisher, being first duly sworn deposes and says that he is and has been since January 1, 1946, Financial Vice President of the University of Southern California. As such officer of such university he has and has had custody of all contracts made between said corporation and other persons, firms or corporations, including the United States and its agencies.

In the regular course of conducting the business of said corporation it has been and is the regular custom of said corporation to preserve and to place in the custody of the holder of affiant's office all contracts entered into between the university and other persons, firms and corporations, including the United States and its agencies. [98]

Among the contract files in the custody of your affiant are certain documents identified as follows:

1. Navy College Contract, 9/15/43, Contract NOp 187, between the United States of America and the University of Southern California; and
2. "This supplement No. 3, dated as of July 1, 1944, to Contract NOp 187, . . . between the United States of America and the University of Southern California . . ."

The photostatic copies of said documents No.'s 1 and 2, identified above, which are attached hereto as Exhibits "A" and "B" respectively, are true and correct copies of the original documents in my custody.

ROBERT D. FISHER

Subscribed and sworn to before me this 16th day of November, 1948.

(Seal)

AUSTIN CLAPP

Notary Public in and for Said County and
State of California [99]

EXHIBIT A

To Affidavit of Robert D. Fisher
Contract NOp 187 Between the United States of America
and the University of Southern California

* * * * *

Whereas, the Navy Department (hereinafter referred to as the Department) requires the use of the Contractor's property and services for the operation of a Navy V-12 Unit (hereinafter referred to as the Training Unit); and

* * * * * [100]

Article 2. Use of Facilities

(a) Annexed hereto as Schedule 3 is a statement identifying the buildings and other property of the Contractor to be used by the Training Unit and stating the general extent of such use. * * *

(b) The Government will pay the Contractor compensation for the use of its property as provided in this Article at the following rate per month beginning with July 1, 1943:

(i) For instructional purposes \$ (See Article 3(b))

(ii) For quarters, subsistence

and other purposes . . \$6813.00.

The above rate includes the maintenance and operation of Graduate Lodge and Shrine Arms (see Schedule 1).

* * * * * [104]

Schedule 1

STATEMENT OF OWNERSHIP

* * * * *

Graduate Lodge and Shrine Arms are owned by Bart-hoff and Maron and are under lease to the Contractor for the duration of the war, subject to the terms and provisions of this Contract. The rent of \$2000 per month on Graduate Lodge and \$1750 per month on Shrine Arms includes full use of the premises and their maintenance and operation in accordance with the provisions of Article 6 hereof. Said rentals are covered in full by the payments provided under Article 2(b)(ii) hereof.

Newkirk Hall is owned by Southwestern Properties, Inc., and is under lease to the Contractor for the duration of the war subject to the terms and provisions of this Contract. The rent of \$1500 per month covers the use of the premises but does not include the maintenance and operation thereof.

* * * * * [124]

Schedule 3

USE OF FACILITIES

* * * * *

No.	Name of Building	Purpose of Use	% Use by V-12 Unit
	Shrine Arms	Quarters for 140	100%

* * * * * [126]

EXHIBIT B

To Affidavit of Robert D. Fisher

Supplement No. 3 to Contract NOp 187 Between the
United States and the University of Southern Cali-
fornia

* * * * *

II. Compensation for Quarters, Subsistence and Medical Services

The rates of compensation provided under the follow-
ing Articles of the Contract are revised as follows:

Article 2(b)(ii)—Compensation for use of property for
quarters, subsistence and other pur-
poses.

July 1 to October 31, 1944	\$6,813.00 per month
----------------------------	----------------------

Beginning November 1, 1944	\$3,063.00 per month
----------------------------	----------------------

* * * * * [130]

III. Use of Facilities

Schedule 3 is amended in its entirety to read as set
forth in revised Schedule 3 attached hereto, effective No-
vember 1, 1944. [1]

[1Schedule 3 drops "Shrine Arms" from the listed facili-
ties.]

* * * * * [131]

[Endorsed]: Filed Nov. 17, 1948. Edmund L. Smith,
Clerk. [134]

[Title of District Court and Cause]

AFFIDAVIT OF HELEN HALL MORELAND

State of California

County of Los Angeles—ss.

Helen Hall Moreland, being first duly sworn, deposes and says:

I am, and since prior to November 1, 1944 have been the Dean of Women of the University of Southern California. In this capacity I have been in charge of the residence halls maintained by the University for its women students, and am familiar with the procedure and requirements for admission to the University and to the university residence halls.

Attached hereto, as Exhibit A, which is by this reference made a part hereof, is a copy of the form of Application for Housing in University Residence Hall, in use by the University of Southern California at all times since November 1, 1944, [135] and prior thereto.

From November 1, 1944 to August 31, 1947, the premises known as 660 West Jefferson Avenue, Los Angeles, California, were in use by the University of Southern California as a university residence hall for women. While in such use said premises were known as Sequoia Hall. During this period, permission of the University to reside in Sequoia Hall was given to various women students of the University who had applied for and been granted permission to attend the University and who had applied for housing in a residence hall. Assignment to a particular residence hall was done by my office, although in all cases, consideration was given to the preference of the student.

Permission to occupy a residence hall was not given unless the following conditions precedent were met by the applicant for housing:

1. The applicant must have been permitted to register as, and have registered as, a regular student in the regular day school of the University;

2. The applicant must have been carrying a minimum of twelve units of scholastic work (a minimum of ten units for graduate students);

3. The applicant must have agreed to the conditions set forth in the application for housing (Exhibit A) including an agreement to live in accordance with University standards, including the Residence Standards of the Associated Women Students.

At all times during the period above mentioned there were in effect Residence Standards of the Associated Women Students. Exhibit B is a copy of the said standards in effect during the scholastic year 1947-1948. The rules in effect during the period November 1, 1944 to August 31, 1947 were of the same type, although differing in details. Exhibit B is, by this reference, made a part hereof. [136]

Permission to occupy a residence hall was and is revoked upon the disqualification of the student, either for scholastic or disciplinary reasons.

Women students, residing in Sequoia Hall during the period above mentioned were supervised as to conduct by a resident and assistant resident, each of whom was responsible to my office, who were during the period mentioned Mrs. Lorinne Pargellis and Mrs. Ivy Gray.

HELEN HALL MORELAND

Subscribed and sworn to before me this 16 day of November, 1948.

(Seal)

AUSTIN CLAPP

Notary Public in and for the County [137]

EXHIBIT A

To Affidavit of Helen Hall Moreland
Form of Application for Housing in University
Residence Halls

Receipt No.

UNIVERSITY OF SOUTHERN CALIFORNIA
Los Angeles 7, California

UNIVERSITY RESIDENCE HALLS
For the Office of the Dean of Women

Room Assignment.....

Not to be filled in by student

Date application was received.....

Not to be filled in by student

Name.....Year (underscore)

1st, 2nd, 3rd, 4th, Grad., Spec.,
Dental Coll., Occupational Therapy

Street No.....

City

Zone

State

Race..... Nationality..... Date of Birth.....

Name of Parent or Guardian.....

Home Address of

Parent or Guardian.....

Street

.....Phone No.....

City

Zone

State

Father's Occupation

Religious Affiliation

Southern California Reference.....

Name

Address.....Phone No.....

Are you a new student?..... A returning student?.....

To be returned to the Office of the Dean of Women,
University of Southern California [138]

I enclose \$25.00 as a deposit for room in a University
Residence Hall for

Term beginning.....

Summer Session beginning.....

I wish as my roommate(s).....

I desire a { single
double
multiple (large room with two or more room-
mates).

Give first and second choice.

Special requests.....

To be signed by students applying for housing.

I understand that unless I withdraw from the University I am engaging a room in a University House for one term. I may not vacate my room within that time unless an acceptable substitute is found to fill my place.

I understand that my room deposit is not refundable unless I cancel my reservation sixty days before the opening of a term.

In case of withdrawal on account of illness, refunds are obtained only on application to the Dean of Women. I understand that I must pay my room bill or a first installment of \$40.00* to the *Business Office* on the day that I register in the University.

I agree to live in accordance with University standards as outlined by the Associated Women Students.

Signed.....[138]

* The remainder is paid in two equal installments at the beginning of the 5th and 9th weeks.

EXHIBIT B

To Affidavit of Helen Hall Moreland
Residence Standards of Associated Women Students,
University of Southern California
ASSOCIATED WOMEN STUDENTS
RESIDENCE STANDARDS

[Crest]

University of Southern California [139]
RESIDENCE STANDARDS

The University of Southern California expects each student to be of such maturity and fine quality that she recognizes both personal and social responsibility for dignified living. Each student is held personally responsible for meeting acceptable standards of good conduct. The University reserves the right to require the withdrawal of any student who, in the judgment of the University, proves herself unable or unwilling to carry this responsibility.

The following regulations shall govern all undergraduate women students whose scholarship records are satisfactory and who reside in University Residence Halls, sorority houses, boarding and rooming houses, and private homes. They apply also to undergraduate guests and alumnae. [140]

JUDICIAL COURT

The purpose of Judicial Court is to create, establish, and maintain a high level of personal and group standards of social behavior in the college community. The Court serves as a student personnel body working in conjunction with the Administration. The Judicial Court is vested with the judicial power of the Associated Women

Students and acts as a court of appeal for any student or student group.

Each student is responsible for reporting her own violation of the rules and is granted the authority to report any violation of the rules by fellow students.

UNDERGRADUATE RESIDENCE STANDARDS

Closed Evenings

Sunday to Thursday inclusive, women students must be in their houses at 10:15 p. m. All first semester freshmen must be in at 7:30 p. m. on closed evenings.

Women students are strongly urged not to leave their houses after dark unaccompanied.

Open Evenings

Friday—2:00 a. m. Saturday—2:00 a. m.

Monday Evenings

Every Monday evening sorority houses will be closed at 8:00 p. m. All women students who have less than a 1.5 academic average for the previous semester or who have required sorority meetings must remain in their houses after 8:00 p. m. There will be no callers after 8:00 p. m. in houses or on grounds. Non-resident women students will either leave houses at 8:00 p. m. or immediately after sorority obligations are over.

Quiet Hours

These hours must be maintained on the days indicated.

Monday through Thursday

10:00 a. m.—12:00 noon

2:00 p. m.— 4:00 p. m.

7:00 p. m.— 9:30 p. m. (except Monday)

11:00 p. m.— 7:00 a. m.

Sunday

7:30 p. m.— 9:30 p. m.

11:00 p. m.— 7:00 a. m. [141]

University Business

1. A student is permitted to be out of her house on University business until 11:00 p. m. on closed evenings. University business includes concerts, plays, activity meetings, rehearsals, etc.
2. A student must ask permission of her Head Resident and sign out for University business before leaving. She must stipulate her destination.

Holidays and Vacations

1. On the night preceding any single University holiday, hours will be extended until 2:00 a. m. On the night of the holiday, if a school day follows, the time limit will be 12:00 midnight.
2. During Christmas and other vacations and between semesters, students must be in the houses on closed evenings at 12:00 midnight. This applies to rushing periods and registration week.

Midweek Functions

Any midweek functions, such as dinners or activity meetings, held in a University residence should end at 8:00 p. m.

Administrative Regulations

1. No woman student may visit a men's residence unit unless an approved chaperon is present.
2. No alcoholic beverage of any kind may be brought into residence units.
3. So called "hellweeks" are strictly forbidden as undignified and dangerous.
4. Water fights have proved dangerous to persons and property. Students may not participate in them in any

way. Disciplinary action will be taken against any individual or group violating this rule.

5. Women students should not appear in shorts, bathing suits, or jeans where they are observed by the public.
6. Students may not patronize liquor establishments in the neighborhood of the University at any time. ("Neighborhood" is interpreted as the area bounded by Washington Boulevard, Budlong Street, Santa Barbara Avenue, and South Broadway.) [142]

Callers

1. No men callers are allowed in women's houses or grounds on Monday through Thursday between 2:00 p. m. and 4:00 p. m.
2. Callers are allowed on Tuesday, Wednesday, and Thursday from 4:00 p. m. to 10:00 p. m. except for first semester freshmen and from 4:00 p. m. to 8:00 p. m. on Monday.
3. Callers must observe quiet hours.
4. Men must leave the house at 12:00 midnight on Friday and Saturday evenings, at 10:00 p. m. on Sunday and closed evenings except Monday.
5. Men must leave women's houses and grounds at 8:00 p. m. on Monday.

Special Permission

1. A "special" is a permission to be out between 10:15 p. m. and 12 midnight on a closed evening.
2. A student may leave her house at any time before 12:00 midnight on a closed evening provided a special permission slip has been approved by the Head Resident.

3. A student may not telephone for special permission after 10:15 p. m. After 10:15 p. m. she will be considered late.
5. Specials allowed per semester:
 - a. First semester freshmen—4 specials.
 - b. First semester transfer students—6 specials.
 - c. All other students are allowed specials on the basis of their grade point average for the preceding semester. (Summer School is not counted): below 1.00—no specials; 1.00-1.49 inclusive—8 specials, (not to be taken on Mondays); 1.50-1.99 inclusive—10 specials; over 2.00—unlimited specials.

Overnight and Week-end Permission

1. A student unable to return to her residence at the time recorded on her absence slip must notify either her Head Resident or the Dean of Women by telephone or telegram.
2. Before leaving for overnight or for the week end, a girl must sign out in person and obtain the approval of the Head Resident. If she goes on a closed evening she forfeits one "special." [143]

GRADUATE STUDENTS

Graduate students living in undergraduate houses have unlimited "specials." Otherwise, all house rules apply to them as well as to undergraduates.

SIGN-OUT PROCEDURES FOR ALL RESIDENTS

House Records

1. Each Head Resident shall accurately maintain a house register and an individual record of special permissions granted for each resident in the house.

2. The house register must be completed filled out by each girl leaving the house after 7:00 p. m.
3. The house register must be signed by each student when she returns. Any girl leaving the house prior to 7:00 p. m. and intending to return after that time must also sign the house register when she leaves and when she returns.
4. No girl may permit another person to sign out or in for her.
5. At the closing hour, the Head Resident is responsible for locking the house and taking up the house register. She may delegate this responsibility to a student officer.
6. Any student who has not returned within the time limit shall not be permitted access to the house register. She must report the time of her arrival to the Head Resident, whose duty it shall be to forward a slip showing such tardiness to the Judicial Court of the Associated Women Students.

COMMITTEE ON STANDARDS

1. A committee shall be appointed in each house for the purpose of maintaining standards. The functions of the Committee shall include maintenance of house rules, University Residence standards as stated above, and standards of personal conduct required of all S. C. women. [144]
2. All minor problems shall be handled by the Committee on Standards, i. e., lateness up to fifteen minutes and infractions of other rules here outlined.
3. The head of the Committee on Standards is appointed by Judicial Court. The special rulings are on a separate sheet for the guidance of the Committee on Standards.

4. The Committee shall maintain quiet hours and enforce penalties given by the Judicial Court.
5. The Committee on Standards is given full power by the Judicial Court to carry out these duties, and their decisions must be upheld.

SOCIAL FUNCTIONS

A social function is defined as a gathering of students (men, women, or both) whose primary purpose is entertainment: dances, luncheons, dinners, desserts, open houses, teas, stags, etc.

Selected social functions may be held between 12 noon and 1:15 p. m., Monday through Friday, and from Friday at 5 p. m. to Sunday, 7:30 p. m.

Organizations of all kinds (including departmental, religious, and service clubs) will (1) hold their meetings at the above hours or (2) terminate their meetings at 8 p. m., Monday, Tuesday, Wednesday, and Thursday evenings. The only exception shall be fraternity and sorority business meetings on Monday evenings; these (as indicated above) *are not to be followed by social functions*.

As far as possible, all University presentations of academic departments (plays, recitals, concerts, special lectures, etc.) will be made on Friday and Saturday evenings, exclusive of the last two weeks of any term.

The success of this program will depend upon a strict adherence to and sympathetic cooperation within its requirements. The program is adopted both for the protec-

tion of students against interruptions in their work and for the encouragement of students to devote a larger portion of their time to strictly academic matters. [145]

PROCEDURE FOR APPROVAL OF SOCIAL FUNCTIONS

All social functions must be approved by the Vice President of the Associated Students and the Dean of Women or the Dean of Men, not less than *one week prior to the date of the function concerned*.

All social functions initiated by women's organizations held on or off the campus require the approval of the Dean of Women. Those initiated by the men's organizations require the approval of the Dean of Men. Those initiated by organizations composed of both men and women must have the approval of the Dean of Women.

Chaperons Required

All off-campus social functions attended by both men and women require the presence of at least three chaperons. Two of this number must be members of the University faculty. This means that they must have the academic rating of instructor, assistant professor, associate professor, full professor, or dean. Parties held on the campus or in fraternity or sorority houses may be chaperoned by a house mother. If no house mother is available, a regular member of the faculty as defined above must act as chaperon. Signed chaperon cards must accompany the application.

Steps in Securing Approval of Social Functions

Approval must first be obtained from the Vice-President of Associated Students (Student Union 230) in order to clear with the calendar and obtain an appropriate date. The request should then be presented *by the organization* to the office of the Dean of Women or the Dean of Men for final approval. The application form on being approved will be returned to the organization by mail.

The organization is responsible for securing approvals before holding the function.

[Endorsed]: Filed Nov. 17, 1948. Edmund L. Smith, Clerk. [146]

[Title of District Court and Cause]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves the Court to restrain and enjoin the defendant, Ben C. Koepke, his agents, servants and employees and all persons acting in concert with him, during the pendency of this action and until final judgment herein, from:

(a) Issuing or purporting to issue the proposed or any order or orders fixing or purporting to fix a maximum rent or rents for the premises known as 660 West Jefferson Blvd., Los Angeles, California, or for any part thereof;

(b) Claiming or asserting that on September 1, 1947, or at any time since that date there was, or has been, or is a maximum rent for the premises at 660 West Jefferson Blvd., Los Angeles, California, or for any part thereof;

(c) Taking any step or proceeding intended to or attempting to enforce any order such as is described in sub- [148] paragraph (a) above, or to enforce any claim or assertion such as is described in subparagraph (b) above, save and except the continued defense of this action.

This motion is made and based upon all of the records, files and documents in this action, upon Plaintiff's Request for Admissions and Defendant Ben C. Koepke's Answers thereto, upon a stipulation of fact dated November 8, 1948, and upon the affidavits of Robert D. Fisher, Hugh C. Willett, Ivy Gray, Helen Hall Moreland, M. H. Bartholf, and N. M. Saunders.

This motion is made upon the ground that an injunction is necessary to preserve the status quo during the pendency of this action and until final judgment herein.

Dated: November 10, 1948.

BENT AND CLAPP

By Austin Clapp

Attorneys for Plaintiff

[Endorsed]: Filed Nov. 17, 1948. Edmund L. Smith, Clerk. [149]

[Title of District Court and Cause]

AFFIDAVIT OF N. M. SAUNDERS

State of California

County of Los Angeles—ss.

N. M. Saunders, being first duly sworn, deposes and says:

At all times mentioned herein I was employed by Frank W. Babcock, the plaintiff herein, to effect the purchase of the property known as 660 West Jefferson Boulevard, Los Angeles, California, and to determine the status under the applicable rent control laws and regulations of the housing accommodations which it was proposed by the said Frank W. Babcock to create and lease.

Prior to June 1, 1947, during the negotiation for the purchase of this property, I went to the Los Angeles Defense Rental Area Office of the Office of the Housing Expediter to [150] determine if and how this property had been registered and found at that time only a registration statement signed by M. H. Bartholf; that said document was the document, a copy of which is the subject of and is attached to the Stipulation of Fact, filed herein, dated November 8, 1948.

Subsequent to the purchase and after July 1, 1947, I again went to the Los Angeles Defense Rental Area Office of the Office of the Housing Expediter to review the matter of the registration and to determine what the status of the housing accommodations would be if the lease of the University was not renewed, which lease could have been continued at their option. I pointed out at that time that the only registration was that of the building as a whole to be used as an Army dormitory

and stated that subsequent to this use it was used by the Navy as a dormitory and then by the students of the University as a dormitory. I was advised by an employee of the Los Angeles Defense Rental Area Office of the Office of the Housing Expediter that since the only registration was that of the building as a whole and since no rents had been registered as apartments or had they ever been rented as apartments since the inception of rent control and if now they were to be reverted back to use as apartments, it would be considered the first time rented and would, therefore, be decontrolled. To support this information, I was handed a mimeographed bulletin headed "Office of Housing Expediter, Office of Rent Control, Washington 25, D. C., July 1, 1947", bearing identification symbols "HRA-9" and pointed out Section E 1(d) on page 8 of said mimeographed document reading as follows:

"E—Decontrol of Certain Types of Accommodations

1. Q: What accommodations are eligible for decontrol on and after July 1, 1947?

A: The following type of accommodations are [151] eligible for decontrol:

* * *

(d) Units not rented between February 1, 1945, and January 13, 1947."

I cannot recall at this time the name of this employee for the reason that at the time of this discussion there was no difference of opinion on the subject between myself and the employee and it seemed perfectly clear to all participating in the discussion that the answer given concerning the status of the accommodations was correct.

During May, 1948 I was requested to consult with the Office of the Housing Expediter concerning the status of the accommodations in said premises and discussed the situation on a number of occasions with H. K. D. Peachey, Deputy Area Rent Director of said office and with Edwin N. Hamlin, Chief Area Rent Attorney of said office.

Prior to June 2, 1948, I submitted to the said Edwin N. Hamlin a written request for an opinion as to the decontrolled status of the premises at 660 West Jefferson Boulevard, Los Angeles, California. Thereafter the said Edwin N. Hamlin prepared an opinion on the status of said housing accommodations which read in pertinent part as follows: "Even though the Army and Navy occupancy of the property as sub-tenants of the university was exempt, and even though the occupancy by students of the university was exempt during the two-year period, it is our opinion that this occupancy by the students did constitute a rental which would preclude the property from being decontrolled."

Thereafter affiant is informed and believes and therefore avers that the said Edwin N. Hamlin submitted a copy of the said interpretation including the paragraph above quoted to William Goldbaum, Regional Rent Attorney of the Regional Housing [152] Expediter's Office at San Francisco, California, for approval and thereafter the said Goldbaum prepared and sent a memorandum to the said Hamlin, which, in pertinent part stated, "In our opinion you have taken the correct position in this case."

Thereafter and on or about the 7th day of July, 1948, the said Edwin N. Hamlin advised me of his opinion and of its confirmation by William Goldbaum, Regional Rent Attorney.

At the time the premises were purchased by the plaintiff in this action, the University of Southern California held said premises under a lease between Mary E. Lewis, as Lessor, and M. H. Bartholf, as Lessee, and as a sub-lease from the said Bartholf to the University. The premises were purchased from the Estate of Mary E. Lewis and at the same time the rights of M. H. Bartholf under his lease and sub-lease were purchased by the plaintiff.

In September, 1948, Defendant Koepke issued notices of Proceedings to determine rents for the various apartments in said premises. The nature of the Proceedings in this respect is typified by the notice relating to Apartment No. 301 in said premises, the pertinent parts of which were as follows:

“In accordance with Section 5(d) of the Rent Regulation the Rent Director proposes to determine the fact that the rent for the above accommodation on the date determining the maximum rent was \$110.00 per month for four rooms and bath, furnished, including dishes, utensils, bedding and linens, mechanical refrigerator, steam heat, weekly maid service. Landlord pays all utilities, telephone service, Tenants pay for laundering of linens. Order, when issued, will be effective as of that date, namely, September 20, 1947.

He further proposes to reduce the above mentioned rent under section 5(c)1, to the rent generally pre-

vailing for comparable accommodations in this defense-rental area on March 1, 1942. Such reduction will be from \$110.00 to \$50.00, and the order, when issued, will be effective from the date of first rent, namely, September 20, 1947." [153]

N. M. SAUNDERS

Subscribed and sworn to before me this 18 day of November, 1948.

(Seal)

AUSTIN CLAPP

Notary Public in and for Said County and State of California.

[Endorsed]: Filed Nov. 18, 1948. Edmund L. Smith, Clerk. [154]

[Minutes: Monday, November 22, 1948]

Present: The Honorable Leon R. Yankwich, District Judge.

For hearing (1) motion of defendant Ben C. Koepke, filed Sept. 27, 1948, to dismiss as to said defendant only, and (2) plaintiff's Order to Show Cause transferred from Superior Court and plaintiff's motion for preliminary injunction; Austin Clapp Esq., appearing as counsel for plaintiff; Frank L. Hirst and Benj. Chapman, Esqs., appearing as counsel for defendants; excerpts from exhibits to affidavits of Fisher, Willett, and Moreland are filed in behalf of plaintiff;

Attorneys Hirst and Clapp argue. Court orders motion to dismiss granted and denies plaintiff's motion for preliminary injunction; and Court orders that temporary restraining order remain in effect until signing of formal order; counsel for defendants to prepare findings and formal order. [155]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW IN CONNECTION WITH ORDER
GRANTING MOTION TO DISMISS AND
DENYING MOTION FOR PRELIMINARY
INJUNCTION

Defendant Ben C. Koepke's motion to dismiss the complaint and plaintiff's motion for a preliminary injunction and the order to show cause why a preliminary injunction should not be issued having come on for hearing on the 22nd day of November, 1948, in the forenoon before the Honorable United States District Judge Leon R. Yankwich, the plaintiff having been represented by Austin Clapp, Esq., of Bent and Clapp, and said defendant having been represented by Frank L. Hirst and Benjamin Chapman, Esqs., and the Court having considered the pleadings, points and authorities, brief and affidavits on file and having been fully informed concerning the matters, now makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. Since June, 1947, Frank W. Babcock, plaintiff herein, has been and now is the owner of the real property known as the Shrine Arms Apartments and located at 660 West Jefferson Boulevard, Los Angeles, California, located [156] within the Los Angeles Defense-Rental Area.

2. At all times pertinent to this suit defendant Ben C. Koepke is the duly appointed, qualified and functioning Area Rent Director for the Los Angeles Defense-Rental Area.

3. At all times pertinent to this suit Ben C. Koepke was authorized to issue orders fixing maximum rents applicable to housing accommodations located in the Los Angeles Defense-Rental Area, including the premises described above, pursuant to the provisions of Section 825.5 of the Controlled Housing Rent Regulation issued September 25, 1948 (12 F. R. 4331), (Code of Federal Regulations, Part 825, Rent Regulations under the Housing and Rent Act of 1947, as amended). For the purpose of issuing such orders Ben C. Koepke is authorized to determine whether the housing accommodations are controlled housing accommodations.

4. As of the date of the filing of the complaint the defendants other than Ben C. Koepke were tenants of plaintiff, residing in the above described housing accommodations.

5. On September 2, 1948, Ben C. Koepke, in proceedings in the Los Angeles Defense Rental Area concerning 660 West Jefferson Boulevard, Los Angeles, California, docketed as Number 271860, issued and mailed to plaintiff notices in writing advising plaintiff that said defendant proposed to issue orders fixing maximum rents for the apartments at said address. Said notices were issued pursuant to, were authorized by, and complied with the provisions of Section 840.7 of Revised Rent Procedural Regulation No. 1, issued May 1, 1948, as amended (13 F. R. 2369).

6. Regulations issued by the Housing Expediter establish an administrative procedure for landlords who desire to secure a review of, or to take an appeal from, orders fixing maximum rents issued by Ben C. Koepke as Area Rent Director. Said administrative procedure for review and appeal is set forth in Sections 840.11 to 840.34

inclusive of Revised Rent Procedural Regulation No. 1, issued May 1, 1948, as amended (13 F. R. 2369). At this stage of the proceedings the remedy afforded to the plaintiff by these provisions of Revised Rent Procedural Regulation No. 1 must be presumed adequate. [157]

From the foregoing Findings of fact the Court now makes its conclusions of law as follows:

Conclusions of Law

1. That Defendant Ben C. Koepke's motion to dismiss the complaint as to him should be granted for the follow—
—and neither has the Court from which the cause was removed jurisdiction,— [LRY, J]

ing reasons: (a) This Court has no jurisdiction, to interfere with the administrative proceedings now pending before defendant Ben C. Koepke, concerning the premises at 660 West Jefferson Boulevard, Los Angeles, California, designated as Docket No. 271860 before such proceedings have reached the stage of coercive finality by the issuance of orders fixing maximum rents, and (b) the plaintiff has an adequate remedy at law in that plaintiff may attack any orders fixing maximum rents which Ben C. Koepke may issue in said proceedings by administrative and subsequent judicial review or appeal, or by way of defense in any action which the Housing Expediter or the tenant defendants may bring pursuant to Sections 205 and 206 of the Housing and Rent Act of 1947 as amended, after plaintiff has exhausted his administrative remedies.

2. That plaintiff is not entitled to a preliminary injunction against the defendant Ben C. Koepka for the following reasons: (a) This Court has no jurisdiction,—and neither has the Court from which the cause was removed jurisdiction, [LRY, J]

tion \wedge to interfere by injunctive process with the administrative proceedings now pending before defendant Ben

C. Koepke concerning the premises at 660 West Jefferson Boulevard, Los Angeles, California, designated as Docket No. 271860 prior to the time that any proposed action has become final and coercive by the issuance of orders fixing maximum rents; (b) irreparable injury will not result to plaintiff by the issuance of such orders since in any suit brought by the Housing Expediter to enforce such orders, the plaintiff, after having exhausted his administrative remedies, may set up as a defense the alleged invalidity of the orders, and (c) The purpose of this action is to allay plaintiff's fears and in fact no controversy exists between plaintiff and defendant Ben C. Koepke of such nature that this Court should take judicial cognizance of it under the Federal Declaratory Judgment Act (28 USC 2201, 2202) or otherwise, except to deny relief by dismissing this action and denying the plaintiff's motion for a preliminary injunction. [158]

3. This suit is a civil action founded on a claim or right arising under the Constitution, treaties or laws of the United States wherein the matter in controversy exceeds the sum or value of \$3,000.00 exclusive of interest or costs, and this Court has jurisdiction of this action.

4. Defendant Ben C. Koepke is entitled to recover costs of suit.

Dated at Los Angeles, California, this 7th day of December, 1948.

LEON R. YANKWICH

Judge

Approved as to Form: Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof, Benjamin Chapman, by Benjamin Chapman, Attorneys for Defendant Ben C. Koepke, this 30 day of November 1948.

Receipt is hereby acknowledge of a copy of the within Findings of Fact and Conclusions of Law in Connection With Order Granting Motion to Dismiss and Denying Motion for Preliminary Injunction, this 2 day of December, 1948. Bent and Clapp, by Austin Clapp, Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 7, 1948. Edmund L. Smith, Clerk. [159]

In the District Court of the United States
Southern District of California

Central Division

No. 8678-Y

FRANK W. BABCOCK,

Plaintiff,

vs.

BEN C. KOEPKE, et al.,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION

Plaintiff's motion for a preliminary injunction to enjoin the defendant Ben C. Koepke, and the Order to show cause why such a preliminary injunction should not issue having come on for hearing on the 22nd day of November, 1948, in the forenoon before the Honorable United States District Judge Leon R. Yankwich, the plaintiff having been represented by Austin Clapp, Esq., of Bent and Clapp, and said defendant being represented by Frank L. Hirst and Benjamin Chapman, Esqs., and the Court having considered the pleadings, points and authorities,

brief and affidavits on file and arguments of counsel and having been fully informed concerning the matters, and having made his written findings of fact and conclusions of law and good cause appearing, now therefore, upon the reasons fully set forth in the said findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed that the plaintiff's motion for a preliminary injunction is denied, and the order to show cause why a preliminary injunction should not issue is discharged, and the temporary restraining order [160] heretofore issued in the Superior Court of the State of California for the County of Los Angeles dated September 16, 1948 is hereby dissolved and discharged.

Dated at Los Angeles, California, this 7th day of December, 1948.

LEON R. YANKWICH
Judge

Approved as to Form: Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof, Benjamin Chapman, by Benjamin Chapman, Attorneys for Defendant Ben C. Koepke, this 30 day of November, 1948.

Receipt is hereby acknowledged of a copy of the within Order Denying Plaintiff's Motion for a Preliminary Injunction this 2 day of December, 1948, 1:27 P. M. Bent and Clapp, by Austin Clapp, Attorneys for Plaintiff.

Judgment entered Dec. 8, 1948. Docketed Dec. 8, 1948. Book 54, page 410, Edmund L. Smith, Clerk; by C. A. Simmons, Deputy.

[Endorsed]: Filed Dec. 7, 1948. Edmund L. Smith, Clerk. [161]

In the District Court of the United States
Southern District of California

Central Division

No. 8678-Y

FRANK W. BABCOCK,

Plaintiff,

vs.

BEN C. KOEPKE, et al.,

Defendants.

ORDER GRANTING MOTION TO DISMISS

Defendant Ben C. Koepke's motion to dismiss the complaint having come on for hearing on the 22nd day of November, 1948, in the forenoon before the Honorable United States District Judge Leon R. Yankwich, the plaintiff being represented by Austin Clapp of Bent and Clapp, and said defendant being represented by Frank L. Hirst and Benjamin Chapman, and the Court having considered the pleadings, points and authorities, brief and affidavits on file and arguments of counsel, and being fully informed concerning the matter and having made his written findings of fact and conclusions of law, and good cause appearing, now therefore, upon the reasons fully set forth in the said findings,

It Is Ordered, Adjudged and Decreed that the above captioned cause shall be and it hereby is dismissed as to the defendant Ben C. Koepke.

Dated at Los Angeles, California, this 7th day of December, 1948.

LEON R. YANKWICH

Judge [162]

Approved as to Form: Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof, Benjamin Chapman, by Benjamin Chapman, Attorneys for Defendant Ben C. Koepke. Dated: This 30th day of November, 1948.

Receipt of a copy of the within Order Granting Motion to Dismiss is hereby acknowledged this 2 day of December, 1948. 1.27 P. M. Bent and Clapp, by Austin Clapp, Attorneys for Plaintiff.

Judgment entered Dec. 8, 1948. Docketed Dec. 8, 1948. Book 54, page 412. Edmund L. Smith, Clerk; by C. A. Simmons, Deputy.

[Endorsed]: Filed Dec. 7, 1948. Edmund L. Smith, Clerk. [163]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that Frank W. Babcock, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order granting motion of defendant Ben C. Koepke, to dismiss the complaint as to him and from the judgment of dismissal of this action entered herein on the 8 day of December, 1948.

Dated: This 9 day of December, 1948.

BENT AND CLAPP

By Austin Clapp

Attorneys for Plaintiff

[Endorsed]: Filed & mld. copy to Benj. Chapman, Atty. for Defts., Dec. 9, 1948. Edmund L. Smith, Clerk. [165]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 169, inclusive, contain full, true and correct copies of Petition of B. C. Koepke, Area Rent Director, on Behalf of the United States of America for Removal of Suit from the State Court; Copy of Complaint for Declaratory Relief and Injunction; Copy of Order to Show Cause and Temporary Restraining Order; Order Enjoining Further Proceedings in State Court in Removed Case; Motion of Ben C. Koepke to Dismiss the Complaint; Affidavits of B. C. Koepke and Tighe E. Woods in Support of Motion to Dismiss; [Affidavit for and Order Granting Continuance of Hearing on Motion to Dismiss filed October 8, 1948; Affidavit for and Order Granting Continuance of Hearing on Motion to Dismiss filed October 15, 1948, pages 1 to 6 of Supplemental Transcript]; Plaintiff's Request for Admissions; Reply to Plaintiff's Request for Admissions; Affidavits of Joan Engelhardt, Marion Clark and Dorothy Burtch; Stipulation of Fact; Affidavits of Ivy Gray, Hugh C. Willett, Robert D. Fisher and Helen Hall Moreland; Notice of and Motion for Preliminary Injunction; Affidavit of N. M. Saunders; Minute Order Entered November 22, 1948; Findings of Fact and Conclusions of Law in Connection with Order Granting Motion to Dismiss and Denying Motion for Preliminary Injunction; Order Denying Plaintiff's Motion for a Pre-

liminary Injunction; Order Granting Motion to Dismiss; Two Notices of Appeal and Appellant's Designation of Record on Appeal which constitute the transcript of record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$25.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14th day of December, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Endorsed]: No. 12118. United States Court of Appeals for the Ninth Circuit. Frank W. Babcock, Appellant, vs. Ben C. Koepke, individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 16, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term 1948, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the ninth day of December in the year of our Lord one thousand nine hundred and forty-eight.

Present:

Honorable William Denman, Chief Judge, Presiding,
Honorable William E. Orr, Circuit Judge,
Honorable Ben Harrison, District Judge.

No. 12118

FRANK W. BABCOCK,

Appellant,

vs.

BEN C. KOEPKE, Individually, and as Area Rent
Director, Los Angeles Defense-Rental Area, Office of
Rent Control, Office of the Housing Expediter,
Appellee.

ORDER STAYING PROCEEDINGS

Upon oral motion of Mr. Ralph Golub, on behalf of counsel for appellant, and upon reading and filing the application of appellant herein, and good cause therefor appearing, It Is Ordered that appellee Ben C. Koepke, Individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, his agents, servants and employees and all persons acting in concert with him, be, for a period of ten days from the date of this order enjoined and restrained from issuing or purporting to issue the proposed or any order or orders fixing or purporting to fix a maximum rent or rents for the premises known as 660 West Jefferson Boulevard, Los Angeles, California, or any part thereof.

At a Stated Term, to wit: The October Term 1948, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the fifteenth day of December in the year of our Lord one thousand nine hundred and forty-eight.

Present:

Honorable William Denman, Chief Judge, Presiding,
Honorable William Healy, Circuit Judge,
Honorable William E. Orr, Circuit Judge.

No. 12118

FRANK W. BABCOCK,

Appellant,

vs.

BEN C. KOEPKE, Individually and as Area Rent
Director, Los Angeles Defense-Rental Area, Office
of Rent Control, O. H. E.,

Appellee.

ORDER CONTINUING MOTION FOR INJUNCTION
PENDING APPEAL, AND EXTENDING
STAY ORDER

Good cause therefor appearing, It Is Ordered that the motion of appellant for an injunction pending appeal, noticed for hearing at San Francisco, on Friday, December 17, 1948, be, and hereby is continued for hearing to Monday, December 20, 1948.

It Is Further Ordered that the stay order of this Court heretofore issued on December 9, 1948, be continued in force and effect until the further order of this Court.

[Title of United States Court of Appeals and Cause]

STATEMENT OF POINTS ON APPEAL

I.

The District Court erred in finding that Appellee was authorized to issue orders fixing maximum rents applicable to the premises at 660 West Jefferson Blvd., Los Angeles, California, and that appellee was authorized in fixing such orders to determine whether the premises were or were not controlled housing accommodations.

II.

The District Court erred in finding that the Notices of Proceedings issued by Appellee were authorized by provisions of Section 840.7 of Revised Rent Procedural Regulation No. 1.

III.

The District Court erred in finding that the remedies afforded to appellant by Revised Rent Procedural Regulation No. 1 were adequate.

IV.

The District Court erred in holding that neither it nor the Court from which the cause was removed had jurisdiction to interfere with the administrative proceedings conducted by Appellee.

V.

The District Court erred in holding that the Appellant had an adequate remedy at law.

VI.

The District Court erred in denying a preliminary injunction against the Appellee.

VII.

The District Court erred in concluding that irreparable injury did not result to Appellant by the issuance of the proposed orders of the Appellee.

VIII.

The District Court erred in concluding that no controversy capable of judicial cognizance existed between Appellant and Appellee.

IX.

The District Court erred in denying Appellant's Motion for Preliminary Injunction and in dissolving the temporary restraining order theretofore issued.

X.

The District Court erred in dismissing Appellant's Complaint as to Appellee.

Dated at Los Angeles, California, December 23, 1948.

BENT AND CLAPP

By Austin Clapp

Attorneys for Appellant

[Endorsed]: Filed Dec. 24, 1948. Paul P. O'Brien,
Clerk.

[Title of United States Court of Appeals and Cause]

ORDER ENJOINING APPELLEE, UPON
APPELLANT'S DEPOSITING RENTALS

Before: Denman, Chief Judge, and Orr, Circuit Judge.

Whereas, it has been ordered that appellee be restrained from issuing any orders fixing a maximum rent or rents for the premises known as 660 West Jefferson Boulevard, Los Angeles, California, or any part thereof till the further order of this court;

Now upon further consideration It Is Ordered that such stay be discontinued five days from the receipt of a certified copy of this order, unless appellant deposit with the United States District Court for the Southern District of California all rentals received by appellant from tenants of the above premises since the filing of the complaint below, and continue so to deposit all further such rentals received by appellant during the pendency hereof.

If it be finally decided that appellee was entitled to determine the maximum rentals as from October 6, 1947, as claimed by him, or as from any other date, then such rentals shall be distributed to the tenants paying them in such amounts as the rentals collected from each exceed the maximum amounts so determined, for the time since the effective date so decided, the balance, if any, to be distributed to appellant. If it be decided that appellee is not entitled to determine such maximum rentals, then the deposited rentals shall be distributed to appellant.

[Endorsed]: Order. Filed Jan. 13, 1949. Paul P. O'Brien, Clerk.

No. 12118 Civil

**In the United States Court of Appeals for the
Ninth Circuit**

FRANK W. BABCOCK, APPELLANT

vs.

**BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT
DIRECTOR, LOS ANGELES DEFENSE-RENTAL AREA,
OFFICE OF RENT CONTROL, OFFICE OF THE HOUSING
EXPEDITER, APPELLEE**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE CENTRAL DIVISION OF THE SOUTHERN DISTRICT OF
CALIFORNIA**

BRIEF FOR APPELLEE

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

NATHAN SIEGEL,

LOUISE F. MCCARTHY,

Special Litigation Attorneys,

*Office of the Housing Expediter, Office of the General Counsel,
Temporary "E" Building, 4th Street and Adams Drive SW.
Washington 25, D. C.*

INDEX

	Page
Statement of Facts.....	1
Argument.....	10
I. The district court was correct in holding that appellee was authorized to issue orders fixing maximum rents applicable to the premises at 660 West Jefferson Boulevard, Los Angeles, California, and that appellee was authorized in fixing such orders to determine whether the premises were or were not controlled housing accommodations.....	10
II. The district court was correct in finding that the Notices of Proceedings issued by appellee were authorized by Section 840.7 of Revised Rent Procedural Regulation No. 1.....	13
III and V. The district court was correct in finding that the remedies afforded to appellant by Revised Rent Procedural Regulation No. 1, were adequate and that he had an adequate remedy at law.....	14
IV. The district court was correct in holding that neither it nor the court from which the cause was removed had jurisdiction to interfere with the administrative proceedings conducted by appellee.....	18
VI and IX. The district court was correct in denying a preliminary injunction against appellee and in dissolving the temporary restraining order theretofore issued.....	19
VII. The district court was correct in concluding that no irreparable injury resulted to appellant by issuance of the proposed orders.....	21
VIII and X. 1. The district court was correct in concluding that no controversy capable of judicial cognizance existed between appellant and appellee and in dismissing appellant's complaint as to appellee..	22
2. The action must be dismissed because it in effect is a suit against the United States which has not consented thereto.....	29
Conclusion.....	31
Appendix.....	32
Excerpts from Housing and Rent Act of 1947, as amended.....	39
Excerpts from Rent Regulations under the Housing and Rent Act of 1947, as amended.....	32
Excerpts from Revised Rent Procedural Regulation.....	35
Opinion in <i>Woods v. Halverson</i>	41
Opinion in <i>Smith v. Duldner</i>	44
Opinion in <i>Whitehall v. Turchi</i>	47

TABLE OF AUTHORITIES

Cases:	Page
<i>Ainsworth v. Barn Ball Room</i> , 157 F. 2d 97 (C. C. A. 4th)-----	31
<i>Alcohol Warehouse Corp. v. Canfield</i> , 11 F. 2d 214 (C. C. A. 2d)---	24
<i>Bankers Utilities Co., Inc. v. National Bank Supply Co., Inc.</i> , 53 F. 2d 432 (C. C. A. 9th)-----	21
<i>Bradley v. City of Richmond</i> , 227 U. S. 477-----	20
<i>Bryan v. United States</i> , 99 F. 2d 549 (C. C. A. 10th)-----	31
<i>Colorado v. Toll</i> , 268 U. S. 228-----	25
<i>Eighth Regional War Labor Board v. Humble Oil and Refining Co.</i> , 145 F. 2d 462 (C. C. A. 5th)-----	24
<i>Gates v. Woods</i> , 169 F. 2d 440 (C. C. A. 4th)-----	16, 19
<i>Gnerich v. Rutter</i> , 265 U. S. 388-----	24
<i>Hannan v. City of Haverhill</i> , 120 F. 2d 87 (C. C. A. 1st)-----	21
<i>Haskins Bros. & Co. v. Morgenthau</i> , 85 F. 2d 677 (App. D. C.)--	31
<i>Howard v. United States</i> , 126 F. 2d 667 (C. C. A. 10th)-----	31
<i>International Trading Corp. v. Edison</i> , 109 F. 2d 825 (App. D. C.)--	31
<i>Jewel Productions v. Morgenthau</i> , 100 F. 2d 390 (C. C. A. 2nd)--	24
<i>Krug v. Fox</i> , 161 F. 2d 1013 (C. C. A. 4th)-----	31
<i>Land v. Dollar</i> , 330 U. S. 731-----	25
<i>Lockerty v. Phillipps</i> , 319 U. S. 182-----	20
<i>Louisiana v. McAdoo</i> , 234 U. S. 627-----	29, 31
<i>Macaulay v. Waterman Steamship Corp.</i> , 327 U. S. 540-----	12, 15
<i>Mine Safety Appliance Co. v. Forrestal</i> , 326 U. S. 371-----	30
<i>Myers v. Bethlehem Shipbuilding Corporation</i> , 303 U. S. 41--- 11,	15, 22
<i>Naganab v. Hitchcock</i> , 202 U. S. 473-----	30, 31
<i>National Conference on Legalizing Lotteries v. Goldman</i> , 85 F. 2d 66 (C. C. A. 2nd)-----	24
<i>Nehar v. Harwood</i> , 128 F. 2d 846 (C. C. A. 9th)-----	24
<i>New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co.</i> , 102 F. 890 (C. C. A. 3rd)-----	21
<i>Noce v. Edward C. Morgan Co.</i> , 106 F. 2d 746 (C. C. A. 8th)----	31
<i>Perkins v. Lukens Steel Co.</i> , 310 U. S. 113-----	15
<i>Petroleum Co. v. Commission</i> , 304 U. S. 209-----	15
<i>Schainman v. Brainard</i> , 8 F. 2d 11 (C. C. A. 9th)-----	21
<i>Smith v. Duldner</i> (N. D. Ohio, E. D.), Civil No. 25308-----	17
<i>Transcontinental & Western Airlines v. Farley</i> , 71 F. 2d 288 (C. C. A. 2nd)-----	29
<i>United States v. Griffin</i> , 303 U. S. 226-----	30
<i>Warner Valley Stock Co. v. Smith</i> , 165 U. S. 28-----	24
<i>Webster v. Fall</i> , 266 U. S. 507-----	24
<i>Wells v. Roper</i> , 246 U. S. 335-----	30
<i>Whitehall v. Turchi</i> , No. 8078 (E. D. Pa.)-----	27
<i>Williams v. Fanning</i> , 332 U. S. 490-----	24, 27
<i>Wilson v. Wilson</i> , 141 F. 2d 599 (C. C. A. 4th)-----	31
<i>Woods v. Halverson</i> (D. C. Minn., 4th Div.)-----	20, 27
<i>Yakus v. United States</i> , 321 U. S. 414-----	20

III

Statutes and Regulations:

Page

Housing and Rent Act of 1947, as amended (50 U. S. C. App., Secs. 1881, et seq.)	19
Section 201(b)	29
Section 202(c) (3) (B)	2, 23
Section 204(a)	23
Section 204(b) (1)	23
Section 204	23
Section 205	6
Section 206	6

Rent Regulations under the Housing and Rent Act of 1947, as amended	5, 23
--	-------

Revised Rent Procedural Regulation 1	8, 13, 14
--------------------------------------	-----------

Judicial Code:

28 U. S. C. 1331	19
28 U. S. C. 1441(b)	19
28 U. S. C. 1442	19
28 U. S. C. 1446	19
28 U. S. C. 2201	6
28 U. S. C. 2202	6

In the United States Court of Appeals for the Ninth Circuit

No. 12118 Civil

FRANK W. BABCOCK, APPELLANT

vs.

**BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT
DIRECTOR, LOS ANGELES DEFENSE-RENTAL AREA,
OFFICE OF RENT CONTROL, OFFICE OF THE HOUSING
EXPEDITER, APPELLEE**

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE CENTRAL DIVISION OF THE SOUTHERN DISTRICT OF
CALIFORNIA*

BRIEF FOR APPELLEE

STATEMENT OF FACTS

This is an appeal from an order of the District Court for the Southern District of California, Central Division, granting a motion by appellee, B. C. Koepke, sued as Ben C. Koepke, to dismiss the complaint of Frank W. Babcock, appellant herein, in an action originally filed by appellant, as plaintiff, in the Superior Court of the State of California for the County of Los Angeles and removed upon petition of appellee-

defendant to the District Court for the Southern District of California.

Appellant, the owner of housing accommodations at 660 W. Jefferson Boulevard, Los Angeles, California (Complaint, Para. 1), brought the action for declaratory relief and an injunction against B. C. Koepke, sued as Ben C. Koepke, Director of the Los Angeles Defense-Rental Area Office of the Office of the Housing Expediter, and the tenants occupying the various units of the housing accommodations at 660 W. Jefferson Boulevard. In this action appellant sought a declaration that the premises were not subject to rent control and an injunction against Koepke restraining him from issuing orders reducing the rents for said housing accommodations (Complaint, Paras. 2, 10 and prayers).

Appellant claimed that the premises were exempt from rent control under the provisions of Section 202 (c) (3) (B) of the Housing and Rent Act of 1947,¹ as amended (50 U. S. C. App. Secs. 1881, et seq.) in that they had not been rented for a successive twenty-four month period between February

¹ Section 202 (c) (3) (B) provides:

“(c) The term ‘controlled housing accommodations’ means housing accommodations in any defense-rental area, except that it does not include—

* * * *

“(3) Any housing accommodations * * * (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations.”

1, 1945 and April 1, 1948 as provided in said subsection.

In support of this claim appellant alleged that the premises had been occupied by Marine Corps personnel from prior to February 1, 1945, to June 1946, that they had remained unoccupied from June to September 1946, and had then been occupied by students of the University of California until August 1947 (Complaint, Pars. 3, 4, and 5). Appellant thereafter accepted surrender of possession from the University and after remodeling and rehabilitating the apartments rented them individually.

As a result of the disagreement between the Office of the Housing Expediter and appellant as to whether the premises were rented as housing accommodations during their occupancy by members of the Marine Corps and students, plaintiff commenced this action. Appellee, Koepke, had advised appellant that he proposed to issue orders fixing maximum rents which would require appellant to refund overcharges to tenants, the other defendants in the action (Petition of B. C. Koepke for removal from the State Court).

Upon the filing of the complaint in the Superior Court of the State of California, in and for the County of Los Angeles, on September 16, 1948, the court granted a temporary restraining order enjoining and restraining Koepke, his agents, servants, and employees from issuing any orders fixing or purporting to fix a maximum rent or rents for the premises at 660 West Jefferson Boulevard and from claiming that the premises were subject to rent control or taking any steps to enforce such a claim

pending disposition of the complaint (Order to show cause and temporary restraining order).

Thereafter on September 21, 1948, B. C. Koepke petitioned for removal of the suit to the District Court of the United States for the Southern District of California, Central Division, showing that this was an action against the United States founded upon an Act of Congress, and a question arising under the Constitution and laws of the United States in which the amount in dispute exceeded \$3,000 (Petition of B. C. Koepke, Area Rent Director, on behalf of the United States of America for removal of suit from the State Court).

Pursuant to said petition, the case was removed to the District Court. B. C. Koepke on September 21, 1948, moved to dismiss the cause on the grounds that Tighe E. Woods, the Housing Expediter, was a necessary and indispensable party-defendant, over whom the District Court had no jurisdiction; that B. C. Koepke could not be sued or enjoined unless the Housing Expediter was a party; that the suit was one against the United States which had not consented to be sued and that the complaint failed to state a cause of action upon which relief could be granted (Motion of Ben C. Koepke to dismiss the complaint).

The motion was argued on November 22, 1948, at which time the Court issued orders granting the motion to dismiss, denying the motion for a preliminary injunction, discharging the order to show cause and retaining the temporary restraining order in effect until the signing of the formal order.

On December 7, 1948, the Court made findings of fact and conclusions of law substantially as follows:

FINDINGS OF FACT

1. Appellant owns the premises at 660 West Jefferson Boulevard, Los Angeles, California, within the Los Angeles Defense-Rental Area.

2. Appellee is the Area Rent Director for said Defense-Rental Area.

3. Appellee at all pertinent times was authorized to issue orders fixing maximum rents pursuant to the Controlled Housing Rent Regulation issued September 25, 1948, and for the purpose of issuing such orders is authorized to determine whether housing accommodations are controlled housing accommodations.

4. Defendants, other than Koepke, are tenants of appellant residing in the housing accommodations.

5. On September 2, 1948, appellee by written notices in accordance with appropriate regulations advised appellant that he proposed to issue orders fixing maximum rents for the said housing accommodations.

6. Regulations issued by the Housing Expediter establish an administrative procedure for landlords desiring to secure a review of, or to appeal from orders of appellee fixing maximum rents. This procedure must be presumed adequate.

CONCLUSIONS OF LAW

1. The motion to dismiss should be granted because:

(a) the District Court and the State court from which the case was removed lack jurisdiction to

interfere with administrative proceedings before they have reached the stage of the issuance of orders fixing maximum rents; and

(b) the plaintiff had an adequate remedy at law in that plaintiff may attack any orders fixing maximum rents by administrative and subsequent judicial review or appeal or by way of defense to any action brought pursuant to Sections 205 and 206 of the Housing and Rent Act, as amended, after plaintiff has exhausted his administrative remedies.

2. The plaintiff is not entitled to a preliminary injunction against defendant because:

(a) the District Court and the State court from which the case was removed lack jurisdiction to interfere with the administrative proceedings prior to the issuance of final orders fixing maximum rents;

(b) irreparable injury will not result to the plaintiff by the issuance of such orders since the plaintiff after exhausting his administrative remedies, may set up the invalidity of the orders as a defense; and

(c) no controversy exists of which the Court should take judicial cognizance under the Federal Declaratory Judgment Act (28 U. S. C. 2201, 2202) or otherwise except to deny relief.

3. The Court had jurisdiction of the suit as one arising under the Constitution, treaties or laws of the United States where the matter in controversy exceeds the sum or value of \$3,000.

4. Defendant is entitled to recover costs.

The formal order was signed and filed on December 7, 1948, and entered in the Civil Judgment Book

on December 8, 1948. On December 9, 1948, plaintiff appealed from the Order of the District Court dismissing the complaint.

On December 7, 1948, after the Court's order dismissing the complaint but prior to its entry in the Civil Judgment Book, B. C. Koepke issued orders reducing the rents for the various units of the housing accommodations at 660 West Jefferson Boulevard, Los Angeles, California.

Thereafter on December 9, 1948, plaintiff-appellant applied to this Court for an order restraining defendant-appellee for a period of ten days from issuing any orders purporting to fix maximum rents for said premises and such an order was granted as of that date.

On December 14, 1948, appellant moved this Court for an injunction pending appeal, enjoining B. C. Koepke from issuing any orders fixing or purporting to fix maximum rents for the housing accommodations at 660 West Jefferson Boulevard or any part thereof. On December 15, 1948, appellant moved for additional relief consisting of an order to appellee to revoke the maximum rent orders issued by him on December 7, 1948.

The motions were argued on December 20, 1948, and this Court instead of acting thereon, ordered appellant to file a brief on the merits in ten days, the appellee to file a reply brief within ten days thereafter and appellant to file a closing brief ten days after the filing of the reply brief. Appellant has designated the record and filed a statement of points

on appeal. However, appellee has not received any brief on the merits from appellant.

In order that appellee may not be in default this brief has been prepared in opposition to appellant's points on appeal which are as follows:

I

The District Court erred in finding that Appellee was authorized to issue orders fixing maximum rents applicable to the premises at 660 West Jefferson Blvd., Los Angeles, California, and that appellee was authorized in fixing such orders to determine whether the premises were or were not controlled housing accommodations.

This is an appeal from the Court's Finding of Fact No. 3.

II

The District Court erred in finding that the Notices of Proceedings issued by Appellees were authorized by provisions of Section 840.7 of Revised Rent Procedural Regulation No. 1.

This is an appeal from the Court's Finding of Fact, No. 5.

III

The District Court erred in finding that the remedies afforded to appellant by Revised Rent Procedural Regulation No. 1 were adequate.

This is an appeal from the Court's Finding of Fact No. 6.

IV

The District Court erred in holding that neither it nor the Court from which the cause was removed had jurisdiction to interfere with the administrative proceedings conducted by Appellee.

This is an appeal from the Court's Conclusion of Law No. 1 (a).

V

The District Court erred in holding that the Appellant had an adequate remedy at law.

This is an appeal from the Court's Conclusion of Law No. 1 (b).

VI

The District Court erred in denying a preliminary injunction against the appellee.

This is an appeal from the Court's Conclusion of Law No. 2.

VII

The District Court erred in concluding that irreparable injury did not result to appellant by the issuance of the proposed orders of the Appellee.

This is an appeal from the Court's Conclusion of Law No. 2 (b).

VIII

The District Court erred in concluding that no controversy capable of judicial cognizance existed between Appellant and Appellee.

This is an appeal from the Court's Conclusion of Law No. 2 (c).

IX

The District Court erred in denying Appellant's Motion for Preliminary Injunction and in dissolving the temporary restraining order theretofore issued.

This is apparently an enlargement of Point VI.

X

The District Court erred in dismissing Appellant's Complaint as to Appellee.

This is apparently a general exception to Conclusion of Law No. 1.

ARGUMENT

I

The district court was correct in holding that appellee was authorized to issue orders fixing maximum rents applicable to the premises at 660 West Jefferson Boulevard, Los Angeles, California, and that appellee was authorized in fixing such orders to determine whether the premises were or were not controlled housing accommodations.

The district court found that appellee had authority to issue orders fixing maximum rents applicable to 660 West Jefferson Boulevard under the provisions of Section 825.5 of the Controlled Housing Rent Regulations issued September 25, 1948 (13 F. R. 5706) (Code of Federal Regulations, Part 825—Rent Regulations Under the Housing and Rent Act of 1947, as amended).² The finding of the district court is clearly correct.

² Applicable portions of this regulation are printed in the Appendix, pp. 32-35.

Appellant has not attacked the validity of the Regulation and could not do so successfully. Section 825.4 of the Regulation provides for registration of controlled housing accommodations and for establishment of maximum rents under Section 825.5 on failure to register. The Housing Expediter has delegated to appellee the authority to make the initial determination as to proper rents for controlled housing accommodations in the Los Angeles Defense-Rental Area. As a necessary corollary appellee has the authority and obligation to apply the statute and regulation to particular situations and thereby to determine at least preliminarily whether or not particular housing accommodations have been decontrolled. Until appellant has exhausted the administrative remedies provided in the statutes and applicable regulations, courts will not interfere with appellee's determination.

This has been established by several decisions of the Supreme Court, particularly *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41 at page 50 in which Bethlehem contended that it was not engaged in interstate commerce and was therefore entitled to enjoin the National Labor Relations Board from conducting a hearing as to its labor practices. The Court said:

The Corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to

enjoin the holding of a hearing by the Board. So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

In *Macauley, Acting Chairman of the United States Maritime Commission v. Waterman Steamship Corp.*, 327 U. S. 540 at page 544, the Supreme Court followed the ruling in the *Myers* case, stating:

Just as in the *Myers* case, the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission.

The district court was therefore correct in holding that appellee was authorized to determine whether the premises were controlled housing accommodations.

II

The district court was correct in finding that the Notices of Proceedings issued by Appellee were authorized by Section 840.7 of Revised Rent Procedural Regulation No. 1.³

Section 840.7 of Revised Rent Procedural Regulation No. 1 (13 F. R. 2369) reads as follows:

§ 840.7 *Action by the Area Rent Director on his own initiative.* In any case where the Area Rent Director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall, before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice.

As stated under I above appellee was authorized to determine whether the housing accommodations were subject to rent control. Appellee's actions complied in all respects with the section quoted. Paragraph 12 of the complaint alleges that defendant mailed to plaintiff notice of his intention to issue orders fixing maximum rents for the apartments.

The district court accordingly was fully justified in finding that the Notices of Proceedings were authorized by Section 840.7 of the Revised Rent Procedural Regulation.

³ Applicable portions of this regulation are printed in the Appendix, pp. 35-39.

III and V

The district court was correct in finding that the remedies afforded to appellant by Revised Rent Procedural Regulation No. 1 were adequate and that he had an adequate remedy at law.

The district court found as a fact (Finding of Fact No. 6) that the Housing Expediter had established an administrative procedure for landlords who desire to secure a review of, or to take an appeal from, orders of an Area Rent Director fixing maximum rents and that, at this stage of the proceedings, the remedy afforded must be presumed to be adequate. The Court found as a matter of law that appellee had an adequate remedy at law. The review and appeal sections referred to by the Court are set out in full in the excerpt from the Revised Rent Procedural Regulation 1 attached hereto. The pertinent sections are *Subpart A, Landlord's Application for Review of Area Rent Director's Action*, Sections 840.11-840.13, inclusive; *Subpart B, Appeals to the Housing Expediter—General Provisions*, Sections 840.14-840.34, inclusive.

These sections provide for review by the Regional Housing Expediter of the appropriate region and for appeal to the Housing Expediter. Appellant contends that, because he must deposit the money he has been ordered to refund in the United States Treasury if he wishes his appeal to operate as a stay, the appeal provisions do not afford him an adequate remedy at law. It is true that the appellant in this case is required to deposit a considerable amount of

money. It is also true that if appellee is correct, he has had the use of that money at the expense of his tenants.

The Supreme Court rejected a similar argument in the *Waterman* case, *supra*, when it said (327 U. S. at p. 545):

Respondent urges several grounds for not applying the rule of the *Myers* case here. It points out that wilful failure to comply with the Adjustment Board's request for information would subject it to penalties under the Act; that the Chairman of the Commission and the Tax Court can enforce their orders without court enforcement proceedings; that the Act specifically provides that the Tax Court's determination is not subject to court review; and that, even if respondent could, subsequent to a Tax Court determination, have resort to the courts, it would be subjected to a multiplicity of suits in order to recover the money due on the contracts. Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies. Its judgment dismissing the complaint was correct. The judgment of the Circuit Court of Appeals is reversed.

See also in this connection, *Petroleum Co. v. Commission*, 304 U. S. 209, 218; *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125; *Myers v. Bethlehem Ship-building Corp.*, 303 U. S. 41.

Anderson v. Schwellenbach, 70 F. Supp. 14 (N.D. Cal.) Three-judge Court, Judges Healy, Roche and Harris

In *Gates v. Woods*, 169 F. 2d 440 (C. C. A. 4th), Gates sought to enjoin the Housing Expediter from enforcing the Rent Regulations under the Housing and Rent Act of 1947, as amended and the district court dismissed the suit. On appeal, this action was affirmed, Judge Dobie, speaking for the Court said:

The rule is well settled that a person must first exhaust the prescribed administrative remedy before he can seek any relief in the courts. As our present Chief Justice (then sitting in the United States Court of Appeals for the District of Columbia) said in *Black River Valley Broadcasters, Inc. v. McNinch*, 101 F. 2d 235, at p. 238:

"It has long been the established rule that proceedings in equity for an injunction cannot be maintained where the complaining party has a plain, adequate, and complete remedy at law for the right sued upon. * * * In general, where there is an administrative remedy provided by statute, it has been declared to be a plain, adequate, and complete remedy, barring injunctive relief."

* * * * *

The plaintiffs have not even attempted to avail themselves of these administrative remedies. They argue that the rent director has exceeded his jurisdiction and that a full investigation would have disclosed that the property in question was decontrolled. The plaintiffs, however, did nothing to bring the facts concerning the property to the attention of the rent director; rather they rushed into the State Court and sought an injunction to checkmate the Housing Expediter and his subordinates

from carrying out the duties imposed upon them by the Act. To sanction such procedure on their part would cut the heart out of administrative action and lead to chaos in the courts. The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject matter. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, and cases there cited.

In *Smith v. Duldner, Cleveland Area Rent Director*, (Civil No. 25308), Judge Jones in the District Court for the Northern District of Ohio, Eastern Division issued a temporary order enjoining enforcement of an order of the Area Rent Director reducing rents on housing accommodations operated by plaintiff on the ground that the Housing and Rent Act of 1947 was unconstitutional. After its constitutionality had been established, Judge Jones dissolved the restraining order and dismissed the complaint, stating "A proceeding in equity cannot be maintained where the party seeking the injunction has an adequate remedy at law. Rent Procedural Regulation No. 1 issued by the Housing Expediter, a copy of which is attached to defendant's brief, provides for review and appeal of the orders of Area Rent Directors and therefore offers plaintiff a remedy at law which must at this stage be presumed to be adequate." (See attached copy of Memorandum on Defendant's Motion to Dissolve Restraining Order and to Dismiss.)

Moreover, as the Court below pointed out, in addition to the administrative remedies, appellant has a

further remedy since, if appellant's contention is correct and the accommodations are not subject to control, he will have an adequate defense to any suit for refund brought by a tenant after he has exhausted his administrative remedies.

In the light of the foregoing it is evident that appellant is afforded an adequate remedy at law.

IV

The district court was correct in holding that neither it nor the Court from which the cause was removed had jurisdiction to interfere with the administrative proceedings conducted by appellee.

As a conclusion of law based on the Findings of Fact the district court determined that it lacked jurisdiction to interfere with the administrative proceedings of appellee until they had reached a stage of coercive finality by the issuance of orders, and that appellant had an adequate remedy at law in that he may obtain administrative review and subsequent judicial review and may assert decontrol as a defense to suits after the exhaustion of his administrative remedies. The district court also concluded that the court from which the cause was removed had no jurisdiction.

The arguments already presented have established that appellant may not invoke the jurisdiction of a district court to interfere with properly constituted administrative procedures. (Points I and III, *supra*, p. 13 and p. 10.) This is merely another way of stating that district courts have no jurisdiction over administrative procedures until the exhaustion of adminis-

trative remedies. Consequently the only new matter raised in this point is the jurisdiction of the state court from which the case was removed.

It is clear that if the case was properly removed the jurisdiction of the state court terminated, since under Section 1446 (e) of the Judicial Code (Title 28 U. S. C. 1446), once the removal is effected the State court "shall proceed no further."

Any civil action commenced in a State court against any officer of the United States for any act performed under color of such office may be removed to a district court (28 U. S. C. 1442). This is such an action. In addition, it arises under the laws of the United States, namely the Housing and Rent Act of 1947, as amended (50 U. S. C. App. 1881, et seq.), and the amount in controversy exceeds \$3,000 and is therefore removable under 28 U. S. C. 1331 and 1441 (b). Clearly then the case was properly removed and the State court was obliged to relinquish any jurisdiction it may have originally acquired. The conclusion of the district court as to lack of jurisdiction, is obviously correct.

See *Gates v. Woods, supra*, for a similar state of facts.

VI and IX

The district court was correct in denying a preliminary injunction against appellee and in dissolving the temporary restraining order theretofore issued.

As was pointed out in *Gates v. Woods, supra*, to permit interference by courts in the administrative proceedings of governmental agencies would result

in chaos. Nor is it to be assumed that such agencies will not act properly. *Yakus v. United States*, 321 U. S. 414, 435, 439; *Bradley v. City of Richmond*, 227 U. S. 477, 485; *Lockerty v. Phillipps*, 319 U. S. 182, 186.

In any event this suit was premature because no order had been entered at the time when suit was instituted. As the Court below found the appellant was not entitled to a preliminary injunction because

(a) This Court has no jurisdiction and neither has the court from which the cause was removed jurisdiction to interfere by injunctive process with the administrative proceedings now pending before defendant Ben C. Koepke concerning the premises at 660 West Jefferson Boulevard, Los Angeles, California, designated as Docket No. 271860 prior to the time that any proposed action has become final and coercive by the issuance of orders fixing maximum rents.

Moreover, there was substantial basis for denial of preliminary injunctive relief here. The Housing Expediter has heretofore promulgated an interpretation of the Rent Regulation under the Housing and Rent Act of 1947, as amended,⁴ which supports the proposed action of appellee. The United States District Court for the Western District of Minnesota, 4th Division, in *Woods v. Halverson*, (Civil No. 2701), has approved the Expediter's interpretation. A copy of the opinion of Judge Nordbye in that case is attached hereto.

Under such circumstances the Court below in the sound exercise of its discretion was justified in refus-

¹ See Appendix, p. 34 for text of the interpretation.

ing to issue a preliminary injunction and this Court should not reverse its decision.

See *Hannan v. City of Haverhill*, 120 F. 2d 87 (C. C. A. 1st) in which the Court reviews the authorities on this point and quotes with approval the following from *New York Asbestos Manufacturing Co. v. Ambler Asbestos Air-Cell Covering Co.*, 102 F. 890, 891 (C. C. A. 3rd).

The granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it; and the decision of a court of first instance, refusing such an injunction, will not, except for very strong reasons, be reversed by this court.

See also *Bankers Utilities Co., Inc., et al. v. National Bank Supply Co., Inc., et al.*, 53 F. 2d 432 (C. C. A. 9th), a decision of this Court to the same effect.

Clearly there was no such manifest abuse of discretion as to warrant reversal of the judgment below.

The temporary restraining order was originally issued by the State court. It expired by its own terms when the district court disposed of the motion for a preliminary injunction. *Schainmann v. Brainard*, 8 F. 2d 11 (C. C. A. 9th). There was accordingly no necessity for the district court to take any action concerning it.

VII

The District Court was correct in concluding that no irreparable injury resulted to appellant by issuance of the proposed orders.

It has already been established that appellant has an adequate remedy at law. If his remedy is adequate, obviously there will be no injury which that remedy will not repair. If the Area Rent Director's orders are sustained, there will be no injury to appellant. If his appeal is allowed, the orders will be revoked *ab initio*. The invalidity of the orders will be a defense in any tenants' suits which may be brought after administrative determination of the status of the properties.

The case of *Myers v. Bethlehem Shipbuilding Corporation, supra*, disposed of the contention that the requirement that a party submit to administrative proceedings to establish its rights would result in irreparable injury. See that portion of the opinion quoted at page 11 of this brief. A claim of irreparable injury will not be recognized where valid administrative procedures have been established. The District Court's holding was, therefore, correct.

VIII and X

- 1. The District Court was correct in concluding that no controversy capable of judicial cognizance existed between appellant and appellee and, therefore, was right in dismissing the complaint as to appellee**

Although the Court below did not cite any specific facts for the above conclusions, appellee in its motion to dismiss had maintained that the action should be dismissed because the controversy was actually between appellant and the Housing Expediter, who was neither sued nor served. If this Court finds that the Housing Expediter is an indispensable party, it should

sustain the conclusions of the Court below, even though that Court did not in fact base its conclusions on such grounds.

Appellee contends that the Housing Expediter is an indispensable party who is not within the jurisdiction of the Court. Primarily, it should be noted that all powers under the Housing and Rent Act of 1947, as amended, are vested in the Housing Expediter by express provisions of Section 204 (a) of the Act. And by Section 204 (d), the Expediter is authorized to issue such regulations and orders as he may deem necessary to carry out the provisions of such section and Section 202 (c). It is the last numbered section which states the requirements to be fulfilled in order for housing accommodations to be exempt from control because they have not been rented for twenty-four successive months.

Pursuant to express authority thus conferred by Section 204 (d), the Housing Expediter issued the Controlled Housing Rent Regulation, hereafter referred to as the "Housing Regulation." By paragraph (b) (2) (iii) of Section 825.1 of such Regulation, as amended, the following housing accommodations, inter alia, are exempt from rent control:

(iii) *Accommodations not rented for two-year period.* Housing accommodations which for any successive 24-month period during the period February 1, 1945 to March 30, 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations.

The foregoing exemption is identical with that set out in Section 202 (c) (3) (B) of the Act, as amended.

The Housing Expediter has issued an interpretation which requires the appellee to regard the housing accommodations at 660 West Jefferson Boulevard as controlled housing accommodations (*supra*, p. 20). In instituting the proceedings complained of, appellee is only carrying out the order of the superior official in whom all powers under the Housing and Rent Act, as amended, are expressly vested under Section 204 (a).

In these circumstances, the Housing Expediter is an indispensable party and, therefore, this suit must be dismissed unless he has been sued in the right court and has been properly made a party. *Williams v. Fanning*, 332 U. S. 490; *Gnerich v. Rutter*, 265 U. S. 388; *Webster v. Fall*, 266 U. S. 507; *Warner Valley Stock Company v. Smith*, 165 U. S. 28; *Alcohol Warehouse Corporation v. Canfield*, 11 F. 2d 214 (C. C. A. 2d); *National Conference on Legalizing Lotteries v. Goldman*, 85 F. 2d 66 (C. C. A. 2d); *Jewel Production v. Morgenthau, Secretary of the Treasury*, 11 F. 390 (C. C. A. 2d); *Neher v. Harwood*, 128 F. 2d 846 (C. C. A. 9th); *Eighth Regional War Labor Board v. Humble Oil and Refining Company*, 145 F. 2d 462 (C. C. A. 5th).

In *Williams v. Fanning*, *supra*, the Postmaster General, after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order directing the respondent, as postmaster at Los

Angeles, where petitioners do business, to refuse payment of any money order drawn to the order of petitioners, to advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all matter directed to petitioners, and to return it to the senders. Petitioners sued the local postmaster to enjoin him from carrying out the order. Motion to dismiss was made on the ground that the Postmaster General was an indispensable party, and granted by the lower courts. The Supreme Court reversed, and held that the motion to dismiss should be overruled. Speaking of *Gnerich v. Rutter*, *supra*, and related cases, the Court said (p. 493):

These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require *him* to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. [*Italics added.*]

The Court then compared the facts and principles in those cases with the facts and principle laid down in *Colorado v. Toll*, 268 U. S. 228, and at the same time, stressed the fact that there was no conflict between these two lines of cases, since the *Toll* case involved a situation where "relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the public treasury or domain, or *interfere* with the *public administration.*' *Land v. Dollar*, 330 U. S. 731, 738" [*Italics added.*].

The Supreme Court went on to say that the decree in the case before it was like the decree in the *Toll* case, since it will “effectively grant the relief desired by expending itself on the subordinate official who is before the Court.” The Court declared that it was the local postmaster *alone* “Who refuses to pay money orders, who places the stamp ‘fraudulent’ on the mail, who returns the mail to the senders.” Thus, as the Court further pointed out, if the local postmaster “desists in those acts, the matter is at an end. That is all the relief which petitioners seek.” Comparing the case before it and the facts in the *Rutter* and related cases, the Court concluded as follows (p. 494):

The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. *No concurrence on his part is necessary* to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command. [Italics added.]

When these principles are applied to the facts in the instant case, it becomes clear that the *Rutter* and related cases should control, rather than the *Toll* case.

As was pointed out above, the Housing and Rent Act of 1947 not only vests all powers, functions, and duties in the Expediter, but also the power to make such adjustments in such maximum rents as may be necessary to correct inequities, or further carry out

the purposes and provisions of this title. The Expediter alone is further authorized and directed to remove any maximum rents in any defense-rental area if, in his judgment, the need for continuing them no longer exists.

Hence, in this case, unlike the *Fanning* case, we do not have a situation where relief can be granted against the subordinate employee named as a defendant without risk that the judgment would interfere with public administration of an Act designed to prevent runaway rent increases. The decree here requested, unlike the one in the *Fanning* case, would restrain this appellee from taking action with respect to this appellant, which has already been held proper with respect to a landlord similarly situated in the *Halverson* case, *supra*. Clearly, its effect is to require the Housing Expediter to take action to reconcile the two situations. It thus falls squarely within the line of cases cited in *Williams v. Fanning* at page 493, where "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

This was the reasoning applied in *Whitehall v. Turchi* (E. D. Pa.), No. 8078, decided March 24, 1948, not reported, a case squarely in point (copy of opinion attached hereto) where the court said:

There is no doubt that if the Regulation is held invalid and the ruling sustained by the appellate courts, the administration of the Act throughout the entire country will be affected

and hence it cannot be said that the judgment awarded would not "interfere with the public administration." *Land v. Dollar*, 330 U. S. 731, 738. As a matter of fact, in that event the Regulation would have to be rescinded or changed. Otherwise, the Housing Expediter would be in the position of directing and requiring his subordinates, by a general regulation, to act contrary to the law. Therefore, "the decree granting the relief sought will" not only interfere with the public administration but will "require him (the defendant's superior) to take action." *Williams v. Fanning*, U. S. Supreme Court, decided December 8, 1947. Although such a decree would not in terms order him to do so, the matter is one of substance, and if the ultimate result of the decree would be to compel action by the superior, the superior is an indispensable party.

One of the cases referred to by the Supreme Court as evolving the principle upon which it rested its decision in *Williams v. Fanning*, *supra*, was *Gnerich v. Rutter*, 265 U. S. 388, and what was said in the opinion in that case can be paraphrased to fit the present case, "The act and the regulations make it plain that the (local Rent Directors) are mere agents and subordinates of the (Housing Expediter). They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been

made a party defendant—the principal one—and given opportunity to defend his direction and regulations.”

2. The action must be dismissed because it in effect is a suit against the United States which has not consented thereto

The action must be dismissed as a suit against the United States which cannot be sued without its consent. “No principle is better established than that the United States may not be sued in the courts of this country without its consent * * *. That the United States is not named in the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can be rendered.” *Louisiana v. McAdoo*, 234 U. S. 627, 628, 629. See also, *Transcontinental & Western Airlines v. Farley*, 71 F. 2d 288, 290 (C. C. A. 2d), certiorari denied, 293 U. S. 603.

Any judgment or decree which can be rendered in this case will plainly affect the rights of the United States. The grave need for the continuation of rent control was made clear by Congress in its declaration of policy under Section 201 (b) of the Housing and Rent Act of 1947, when it declared that it “recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon

rents charged for rental housing accommodations in defense-rental areas.” With this vital public welfare at stake, it is plain that the Government is the real party in interest and the attempt made here to prevent Government officials from discharging their statutory responsibilities is in reality a suit against the United States.

This conclusion is thoroughly supported by controlling decisions of the Supreme Court and lower courts. (*Naganab v. Hitchcock*, 202 U. S. 473; *Wells v. Roper*, 246 U. S. 335; *United States v. Griffin*, 303 U. S. 226; *Mine Safety Appliance Company v. Forrestal*, 326 U. S. 371.⁵

Even though the action in this case is against officers or agents of the United States, it is not one to enjoin individual action contrary to law, but rather a suit to restrain an officer of the Government in performance of his official duties and, therefore, it is an action against the United States. Such an action will not lie unless the United States has consented to be sued. Since the United States has not consented to be sued in this type of proceeding, and since it is an indis-

⁵ Suit to restrain Secretary of the Interior from carrying out the provisions of Act of June 27, 1902, c. 1157, 32 Stat. 400, controlling the disposition of pine lands ceded by the Indians is, in effect, a suit against the United States. *Naganab v. Hitchcock*, *supra*.

Suit to enjoin Postmaster General from annulling contract for collecting and delivering mail in Washington, deemed one against the United States. *Wells v. Roper*, *supra*.

Suit to set aside an order of Interstate Commerce Commission concerning railway mail pay is not primarily one against the Commission, but is primarily against the United States. *United States v. Griffin*, *supra*.

pensible party to this case, this action against the Government officers must be dismissed. *Louisiana v. McAdoo*, *supra*; *Wells v. Roper*, *supra*; *Naganab v. Hitchcock*, *supra*; *Bryan v. United States*, 99 F. 2d 549 (C. C. A. 10th), certiorari denied, 305 U. S. 661; *Noce v. Edward C. Morgan Company*, 106 F. 2d 746 (C. C. A. 8th); *Wilson v. Wilson*, 141 F. 2d 599 (C. C. A. 4th); *International Trading v. Edison*, 109 F. 2d 825 (App. D. C.), certiorari denied, 310 U. S. 652; *Haskins Bros. & Company v. Morgenthau, Secretary of Treasury, et al.*, 85 F. 2d 677 (App. D. C.); *Krug v. Fox*, 161 F. 2d 1013 (C. C. A. 4th); *Howard v. United States*, 126 F. 2d 667, 668 (C. C. A. 10th), certiorari denied, 62 S. Ct. 1297; *Ainsworth v. Barn Ball Room*, 157 F. 2d 97 (C. C. A. 4th).

CONCLUSION

It is therefore respectfully submitted that the action of the District Court in dismissing the complaint and denying a preliminary injunction is correct, and the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

CONTROLLED HOUSING RENT REGULATION (13 F. R. 5706)

§ 825.4 *Maximum rents*—(a) *Maximum rents in effect on June 30, 1947.*—The maximum rent for any housing accommodation under §§ 825.1 to 825.12, inclusive (unless and until changed by the Expediter as provided in § 825.5), shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended, and the applicable rent regulation issued thereunder, except as otherwise provided in this section. * * *

(c) * * *.

* * * * *

If the landlord fails to file a proper registration statement within the time specified, the rent received for any rental period commencing on or after the date of the first renting shall be received, subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under § 825.5 (c) (1) or (6). Such amount shall be refunded to the tenant within 30 days after the date of the issuance of the order unless the refund is stayed in accordance with the provisions of Revised Rent Procedural Regulation 1 (Part 840 of this chapter). If the Expediter finds that the landlord was not at fault in failing to file a proper registration statement within the time specified the order under § 825.5 (c) may relieve the landlord of the duty to refund. The landlord shall have the duty to refund only if the order under § 825.5

(c) is issued in a proceeding commenced by the Expediter within 3 months after the date of filing of such registration statement.

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§ 825.5 *Adjustments and other determinations.*—This section sets forth specific standards for the adjustment of maximum rents. In applying these standards and entering orders increasing or decreasing maximum rents, the Expediter shall give full consideration to the correction of inequities in maximum rents and the purposes and provisions of the Housing and Rent Act of 1947, as amended.

In the circumstances enumerated in this section, the Expediter may issue an order changing the maximum rents otherwise allowable or the minimum space, services, furniture, furnishings or equipment required, except in cases where an order increasing or decreasing the maximum rent on the same facts and grounds was entered under the rent regulations issued pursuant to the Emergency Price Control Act of 1942, as amended.

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(c) *Grounds for decrease of maximum rent.*—The Expediter at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that:

(1) *Rent higher than rents generally prevailing.*—The maximum rent for housing accommodations established under paragraph (c), (d), (e), (g), or (j) of section 4 of the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, or under § 825.4 (c) or (e) is higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date.

Where the maximum rent for said housing accommodations was originally established under paragraph (c), (d), (e), or (j) of section 4 of the Rent Regulation for Housing, issued pursuant to the Emer-

gency Price Control Act of 1942, as amended, and the landlord failed, due to his fault, to file a timely proper registration statement, the rent received for any rental period commencing on or after July 1, 1947 shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under this section. Such amount shall be refunded to the tenant within 30 days after the date of the issuance of the order, unless the refund is stayed in accordance with the provisions of Revised Rent Procedural Regulation 1 (Part 840 of this chapter). The landlord shall have the duty to refund only if the order under this section is issued in a proceeding commenced by the Expediter within 3 months after the date of filing of such registration statement.

* * * * *

APPENDIX—INTERPRETATIONS

LEASES MADE UNDER SECTION 204 (B) OF THE HOUSING AND RENT ACT OF 1947, AS AMENDED

* * * * *

DECONTROL OF CERTAIN CLASSES OF HOUSING ACCOMMODATIONS

* * * * *

VI. *Housing accommodations not rented for any successive twenty-four-month period between February 1, 1945, and March 30, 1948.*

* * * * *

9. *Housing accommodations which were exempt from rent control during two-year period.*—Where during the two-year period housing accommodations were rented under circumstances which caused the renting to be exempt from the rent regulations, the mere fact that such an exemption existed does not result in decontrol.

* * * * *

Another example of the same principle is the following: A college dormitory was occupied by students during the two-year period under circumstances

which made rooms exempt from rent control. After the two-year period, the college proposes to rent the rooms in the structure to professors or other persons on an ordinary landlord-tenant basis. Such a renting would be subject to rent control because, although the rooms in the dormitory were exempt during the two-year period, they were in fact rented to persons other than members of the landlord's immediate family.

REVISED RENT PROCEDURAL REGULATION No. 1 (13 F. R. 2369)

SUBPART A—LANDLORDS' PETITION; AND TENANTS APPLICATIONS

§ 840.7 *Action by the Area Rent Director on his own initiative.*—In any case where the Area Rent Director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall, before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice.

LANDLORD'S APPLICATION FOR REVIEW OF AREA RENT DIRECTOR'S ACTION

§ 840.11 *Landlord's application for review.*—(a) Any landlord, except a landlord subject to an order issued pursuant to § 840.8 (c), whose petition for adjustment or other relief has been dismissed or denied in whole or in part by the Area Rent Director, or any landlord subject to an order entered by the Area Rent Director on his own initiative, may file with the Area Rent Director an application for review of such determination by the Regional Housing Expediter for the region in which the defense-rental area office is located: *Provided*, That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered

by the Area Rent Director under § 840.7, may either apply for review of such order as provided in this section, or may appeal any provision of such order as provided in § 840.14 and following of this part. An application for review shall be filed in triplicate upon forms prescribed by the Housing Expediter and pursuant to instructions stated on such forms. Upon the filing of an application for review or appeal with respect to such determination, the Area Rent Director shall forward the record of the proceedings, with respect to which such application for review is filed, to the appropriate Regional Housing Expediter, or, in the case of an appeal, to the Housing Expediter: *Provided, however,* That the Area Rent Director, within fifteen days after the filing of such application for review or appeal, may grant the relief requested therein, in whole or in part, by revoking or modifying his order upon reconsideration, without notice, except where such order has the effect of requiring the landlord to make a refund to the tenant pursuant to the rent regulations and the landlord has obtained a stay of his obligation to refund in accordance with the provisions of this part.

Within ten days after date of issuance of an order upon reconsideration by the Area Rent Director, the landlord shall file in the Area Rent Office a written statement electing either to withdraw or to continue in effect the pending application for review or appeal. If such statement is not filed within the time provided the application for review or appeal shall be dismissed.

(b) Applications for review may be filed within sixty (60) days after the date of issuance of the determination to be reviewed. An application for review which is not filed within the specified time ordinarily will be dismissed unless special circumstances are shown to justify a later filing.

(c) Where the effect of an Area Rent Director's order is to require a landlord to make a refund to the tenant in accordance with the provisions of section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation, section 5 (b) (2) of the

Rent Regulation for Controlled Rooms in Rooming Houses and other Establishments, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for New York City Defense-Rental Area, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments in New York City Defense-Rental Area, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Miami Defense-Rental Area, section 5 (b) (2) of the rent regulation for Controlled Rooms in Rooming Houses and Other Establishments in Miami Defense-Rental Area, or section 4 (c), 4 (e), (5) (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Atlantic County Defense-Rental Area, the obligation to refund shall be stayed if the landlord, within thirty (30) days after the date of issuance of said order, duly files an application for review together with a refund transmittal memorandum directed to the Regional Budget and Finance Officer on forms prescribed by the Housing Expediter, accompanied by a certified check or money order in the amount of the refund payable to the U. S. Treasurer, and such additional information and documents as may be required. The money so deposited shall be distributed pursuant to the order of the Regional Housing Expediter or in accordance with the final disposition of the proceedings.

§ 840.12 *Action on application for review.*—Upon the filing of an application for review in accordance with § 840.11 and after due consideration the Regional Housing Expediter may, by appropriate order, affirm, revoke, or modify, in whole or in part, the determination of the Area Rent Director sought to be reviewed, or, if considered necessary or appropriate, may remand the proceedings to the Area Rent Director for further action not inconsistent with the determination of the Regional Housing Expediter. In any case where an application for review does not conform in a substantial respect to the requirements of this part, the Regional Housing Expediter may dismiss such

application. An order entered by a Regional Housing Expediter upon an application for review shall be effective and binding until changed by further order and shall be final subject only to appeal as provided in § 840.14 and following of this part. An order entered by a Regional Housing Expediter upon an application for review may be revoked or modified at any time, *Provided, however*, Due notice of the intention so to revoke or modify was previously given to the applicant.

If the effect of the order of the Area Rent Director is to require a refund of rent to the tenant under section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for New York City Defense-Rental Area, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments in New York City Defense-Rental Area, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Miami Defense-Rental Area, section 5 (b) (2) of the rent regulation for Controlled Rooms in Rooming Houses and Other Establishments in Miami Defense-Rental Area, or section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Atlantic County Defense-Rental Area, the modification or revocation of said order by the Regional Housing Expediter or by the Area Rent Director upon remand, as it affects the refund, shall be retroactive if a stay has been obtained pursuant to § 840.11.

§ 840.13 *Receipt of oral testimony.*—(a) In most cases, evidence in application for review proceedings will be received only in written form. This procedure is most conducive to the fair and expeditious disposition of such proceedings. However, the person filing an application for review may request the receipt of oral testimony. Such request shall be accompanied by a showing as to why the filing of affidavits or

other written evidence will not permit the fair and expeditious disposition of the application.

(b) In the event that the Regional Housing Expediter orders the receipt of oral testimony, notice shall be served on the person filing the application, not less than five (5) days prior to the receipt of such testimony, which notice shall state the time and place of the hearing and the name of the presiding officer designated by the Regional Housing Expediter.

(c) A stenographic report of any hearing of oral testimony shall be made, a copy of which shall be available during business hours in the appropriate Regional or Area Office.

SUBPART B—APPEALS TO THE HOUSING EXPEDITER

Introduction.—Subpart B deals with “appeals” to the Housing Expediter. An appeal is the means provided for landlords to make formal objections to a maximum rent regulation or order.

The filing and determination of a proper appeal is ordinarily a prerequisite to obtaining judicial review of administrative determinations. At any time during the administrative consideration of an appeal directed solely to a regulation, the Housing Expediter may refer the appeal to the Area Rent Director for the area from which the appeal arises and request such Area Rent Director to make recommendation with respect to the disposition of the appeal.

HOUSING AND RENT ACT OF 1947, AS AMENDED (50 U. S. C. A. SECS. 1881, ET SEQ.)

SEC. 201. (b) The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attain-

ment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because of the inadequacies of the maximum rents applicable to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency.

SEC. 202. As used in this title— * * *

(c) The term “controlled housing accommodations” means housing accommodations in any defense-rental area, except that it does not include— * * *

(3) any housing accommodations * * * (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations; * * *

SEC. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until the close of March 31, 1948.

(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person

shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations.

Woods v. Halverson, D. C. Minn., 4th Div.

MEMORANDUM

The primary question before the Court is whether apartments 1, 5, 7, 8, and 9 were housing accommodations as that term is used in Section 202 (c) (3) (B) of the Act, which exempts any housing accommodations from the Act which were not rented as such for any successive 24 month period from February 1, 1945 to the date of the enactment of the Housing and Rent Act of 1948.

The premises in question consist of a three-story house in a residential area of this city. During the 24 month period in question, the first floor of the building was being used as a school, and the second and third floors, consisting of dormitory rooms, were rented to the students, faculty and employees of the school. It is recognized that, during this period, the

school was operated for profit, and during the school year those who occupied the premises paid the required consideration to the school as rent for such accommodations. The rooms thus occupied on the second and third floors were physically segregated from the portion of the building on the first floor, where the classes of the school were conducted. During the time these premises were occupied by the school, they were exempted from the housing regulations by Section 1 (b) (3), Rent Regulation for Hotels and Rooming Houses, because the rooms were used in connection with an educational institution. It appears that the predominant part of the space in the building during the time a school was conducted therein was used for housing students, faculty, etc. It seems clear that, upon the school's discontinuing the use of the premises, this house became subject to rent control if it can be said that the second and third floors were rented as housing accommodations during the 24-month period.

Upon consideration of the showing made herein, it seems evident that these rooms were rented as housing accommodations during the period in question. The second and third floors were not occupied for commercial purposes and had no other use except to provide housing accommodations for the students, faculty, and employees of the school. Were it not for the exemption granted to the school, these premises would have been under rent control during this period. The fact that the availability of the housing accommodations was limited to students, faculty, and employees of the school does not detract from their status as housing accommodations. No good reason is suggested why a sensible and practicable interpretation should not be accorded to Section 202 (c) (3) (B) of the Act in determining whether the present housing accommoda-

tions are subject to the Act. There is no commercial venture which is now being conducted in these premises other than the furnishing of housing accommodations. From every practical consideration, the premises were rented as housing accommodations during the period in question, and the school being conducted on the first floor, although related to the use of the second and third floors, did not change the character of the use of the housing accommodations therein. If a school had been conducted on the first floor and the second and third floors occupied by tenants having no relation to the school, one would not question a finding that the upper floors were rented as housing accommodations within the meaning of the Act. The relationship of the tenants to the school does not change the kind of use for which the space was utilized.

Some point is made of the fact that apartments 7, 8, and 9 were not subject to the Act because they were created by conversion and not completed until after February 1, 1947. While there is competent evidence that they were fully completed prior to that date, the benefit of any doubt may be given to the defendant. She relies on Section 202 (c) (3) (A), which provides that housing accommodations are decontrolled where "the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947." Apartments 7, 8, and 9 were formerly a large room. This room was converted into three apartments and the conversion took place before February 1947. There may be some question as indicated above as to whether or not there were a few items unfinished on February 1, 1947, but the conversion as such had been consummated before that date; in fact, students of the school were occupying these

converted rooms prior to February 1st. Moreover, it would seem that the term "completed" as used in Section 202 (c) (3) (a) is used in connection with new construction, not conversion.

Let this memorandum be made a part of the foregoing Findings of Fact, Conclusions of Law and Order for Judgment.

GUNNAR H. NORDBYE,
Judge.

In the District Court of the United States for the
Northern District of Ohio, Eastern Division

HAZEL L. SMITH, PLAINTIFF

vs.

KARL DULDNER, CLEVELAND AREA RENT DIRECTOR,
DEFENDANT

Civil No. 25308

MEMORANDUM ON DEFENDANT'S MOTION TO DISSOLVE
RESTRAINING ORDER AND TO DISMISS.

JONES, J.: On December 3, 1947, this Court issued a temporary order enjoining enforcement of an order of the Area Rent Director reducing the rents of certain housing accommodations operated by plaintiff. Plaintiff sought a permanent injunction against the enforcement of the rent reduction order on the grounds that (1) the Housing and Rent Act of 1947, pursuant to which the rent order was issued, was unconstitutional and invalid, and (2) the procedure followed by defendant prior to the issuance of the rent order, and the order itself, constituted violations of due process of law. Plaintiff further alleged that she had no adequate remedy at law against the conse-

quences of the allegedly invalid rent order and would suffer irreparable injury by reason of its issuance.

The matter now for consideration is defendant's motion to dissolve the temporary restraining order and to dismiss the complaint.

Briefly, the facts, as alleged in the complaint are as follows:

Plaintiff operates a rooming house containing approximately twenty rental units. On November 3, 1947, plaintiff received a notice from the defendant Area Rent Director to the effect that he proposed to reduce the maximum rents for plaintiff's rental units. Plaintiff duly filed objections to the proposed reduction with the defendant. Notwithstanding the objections, defendant issued an order, dated and purporting to become effective on November 24, 1947, reducing the maximum rents for plaintiff's rental units in varying amounts ranging from 30 to 60 percent of the maximum rents theretofore in effect. The petition for an order enjoining enforcement of the order issued by defendant was subsequently filed in this court.

On November 20, 1947, this Court held the Housing and Rent Act of 1947 to be unconstitutional in *Woods v. The Cloyd Miller Company*, 74 F. Supp. 546. It was upon the basis of its decision in the *Miller* case that this Court overruled defendant's first motion to dismiss and issued the temporary restraining order. The fact that plaintiff had not alleged that she had exhausted her administrative remedy was immaterial inasmuch as the law upon which the procedure was based had been held to be invalid. The Supreme Court subsequently reversed this Court in the *Miller* case, 68 S. Ct. 421, holding the Housing and Rent Act of 1947 to be constitutional. Thus, one of the grounds alleged in support of plaintiff's petition for

an injunction became untenable and the plaintiff became precluded from asserting the other ground, i. e., the illegality of the procedure followed by the Rent Director in issuing his order, since she had not alleged that she had exhausted her administrative remedies.

A proceeding in equity for an injunction cannot be maintained where the party seeking the injunction has an adequate remedy at law. Rent Procedural Regulation No. 1 issued by the Housing Expediter, a copy of which is attached to defendant's brief, provides for review and appeal of the orders of Area Rent Directors and therefore offers plaintiff a remedy at law which must, at this stage, be presumed to be adequate.

Although plaintiff contends that, on a motion to dismiss, all of the allegations of her complaint must be accepted as true; but Rule 12 (b), Rules of Civil Procedure, provides that on a motion to dismiss for failure to state a claim upon which relief may be granted, wherein matters outside of the pleadings are presented, "the motion shall be treated as one for summary judgment * * *." This provision authorizes the Court to consider and decide issues of law where there appears to be no dispute as to the facts.

The temporary restraining order herein will be dissolved and the case dismissed on the ground that plaintiff has not stated a claim upon which relief in equity may be granted in that she has an adequate remedy at law.

Since Procedural Regulation No. 1 limits the number of days following the issuance of an order within which an application for review or an appeal may be filed it is ordered that the time from December 3, 1947, to and including the date of this dismissal and vaca-

tion not be included in calculating the number of days within which plaintiff may apply for review or appeal of the Rent Director's order of November 24, 1947.

(S) JONES, *United States District Judge.*

SEPTEMBER 23, 1948.

In the District Court of the United States for the
Eastern District of Pennsylvania

Civil Action No. 8078

WHITEHALL, INC.

v.

JOSEPH T. TURCHI, RENT DIRECTOR, PHILADELPHIA
DEFENSE RENTAL AREA

SUR MOTION TO DISMISS THE COMPLAINT

March 24, 1948

Before KIRKPATRICK, J.

The plaintiff corporation is the owner of a building referred to in the complaint as "Whitehall Apartment Hotel." It applied to the defendant, the Rent Director of the Philadelphia Defense Rental Area, for decontrol and the application was denied, the reason given being that "On June 30, 1947, none of the units in the establishment received all of the five services specified in the Housing and Rent Act of 1947."

In the present action the plaintiff asserts that the order of the defendant is invalid and asks the Court for injunctive relief against its enforcement and for a declaration that it is invalid and unenforceable. The defendant has moved to dismiss the complaint

on the grounds that the Housing Expediter, who cannot be served with process in this District, is an indispensable party, and also because it fails to state a claim upon which relief can be granted.

The constitutionality of the Housing and Rent Act of 1947 can no longer be doubted in view of the decision of the Supreme Court in *Tighe E. Woods v. The Cloyd W. Miller Co.*, decided February 16, 1948.

The pertinent portion of the Act provides, Sec. 202, “(c) the term ‘controlled housing accommodations’ means housing accommodations in any defense-rental area, except that it does not include—(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service * * *.”

The Regulation of the Housing Expediter thereunder provides, Sec. 1, “(b) Housing to which this regulation does not apply * * * (7) (i) Housing accommodations in a hotel * * * which are occupied by persons who are provided customary services including maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy services * * *.”

The plaintiff's attack upon the defendant's order proceeds along two distinct lines. The first is that the Regulation (assuming its validity) does not authorize it. The order was expressly based on what amounts to a finding that none of the units in the plaintiff's building *received* all the services enum-

erated in the Act.* The argument is that the word "provided" which appears in both the Act of Congress and the Regulation means merely that the services enumerated must be made available to the tenant, that readiness to serve (regardless of whether an additional charge is made) is the test, and that the fact that the tenants of its building did not receive all the services is immaterial inasmuch as there is nothing to show that they might not have had them all. Hence, says the plaintiff, the defendant acted outside the scope of his authority under both the statute and the Regulation and illegally.

If this were the sole basis of the plaintiff's case, the complaint would have to be dismissed because the plaintiff has not availed itself of the administrative remedy provided by the Regulations. *Yakus v. United States*, 321 U. S. 414.

The second line of attack is directed at the position taken by the local Rent Director, as disclosed by his order, that, in order to entitle the building to de-control, *all* of the five services must be present in the case of each tenant. In so ruling, the Rent Director acted in accordance with and, in fact, as required by the Regulation. The plaintiff, however, contends that the Regulation illegally narrows the statutory definition of properties exempted from control. The Act said "customary hotel services *such as* * * *", naming five. The Regulation says "customary hotel services *including* * * *", the five. If the word "including" means that the five named are irreducible minimum, the Rent Director would be compelled by the Regulation to refuse de-control in any case in which less than five were furnished. Thus, in this branch of the case, the defendant's order stands or falls with the Regula-

tion. If the plaintiff's argument on this point be accepted, then the decree of this Court would necessarily have to declare the Regulation invalid and illegal, and that, in substance, is what the plaintiff asks the Court to do.

There is no doubt that if the Regulation is held invalid and the ruling sustained by the appellate courts, the administration of the Act throughout the entire country will be affected and hence it cannot be said that the judgment awarded would not "interfere with the public administration." *Land v. Dollar*, 330 U. S. 731, 738. As a matter of fact, in that event the Regulation would have to be rescinded or changed. Otherwise, the Housing Expediter would be in the position of directing and requiring his subordinates, by a general regulation, to act contrary to the law. Therefore, "the decree granting the relief sought will" not only interfere with the public administration but will "require him (the defendant's superior) to take action." *Williams v. Fanning*, U. S. Supreme Court, decided December 8, 1947. Although such a decree would not in terms order him to do so, the matter is one of substance, and if the ultimate result of the decree would be to compel action by the superior, the superior is an indispensable party.

One of the cases referred to by the Supreme Court as evolving the principle upon which it rests its decision in *Williams v. Fanning*, *supra*, was *Gnerich v. Rutter*, 265 U. S. 388, and what was said in the opinion in that case can be paraphrased to fit the present case, "The act and regulations make it plain that the (local Rent Directors) are mere agents and subordinates of the (Housing Expediter). They act under his direction and perform such acts only as

he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations.”

The motion to dismiss is therefore granted.



No. 12118

**In the United States Court of Appeals
for the Ninth Circuit**

FRANK W. BABCOCK, APPELLANT

v.

**BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT
DIRECTOR, LOS ANGELES DEFENSE-RENTAL AREA,
OFFICE OF RENT CONTROL, OFFICE OF THE HOUSING
EXPEDITER, APPELLEE**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE CENTRAL DIVISION OF THE SOUTHERN DISTRICT
OF CALIFORNIA**

SUPPLEMENTAL BRIEF OF APPELLEE

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INDEX

	Page
Introduction.....	1
Argument:	
I. There is no merit to appellant's contention that Section 202 (c) of the Housing and Rent Act of 1947 is self-executing.....	2
II. There is no merit to appellant's contention that the Court has equitable jurisdiction under the Declaratory Judgment Act, even though appellant has failed to exhaust his administrative remedies.....	
III. There is no merit to the contention that under the circumstances of the case, compliance with the rule requiring exhaustion of administrative remedies will constitute denial of due process because of appellant's alleged inability to make the necessary escrow deposit.....	5
IV. There is no merit to the contention that the Court erred in finding that appellee was authorized to issue orders fixing maximum rents applicable to the premises and, in fixing such orders, to determine whether the premises were or were not controlled and in finding that the notices of proceedings issued by appellee were authorized by Section 840.7 of Revised Rent Procedural Regulation.....	15
V. There is no merit to the contention that the Court abused its discretion in denying appellant's motion for a preliminary injunction.....	16
Conclusion.....	17
	18

TABLE OF CASES

<i>Abbet Holding Corporation v. Woods</i> , 167 F. 2d 472 (E. C. A.).....	9
<i>Aircraft & Diesel Corp. v. Hirsch</i> , 331 U. S. 752.....	6, 9, 11, 16
<i>Anderson v. Schwellenbach</i> , 70 F. Supp. 14 (N. D. Cal.).....	9
<i>Bradley Lumber Company v. National Labor Relations Board</i> , 84 F. 2d 97 (C. C. A. 5th), certiorari denied, 299 U. S. 559.....	10, 16
<i>Columbia Broadcasting System v. United States</i> , 316 U. S. 407.....	14
<i>Commonwealth v. O'Keefe</i> , 298 Pa. 169, 148 Atl. 73.....	16
<i>Doehler Metal Furniture Company v. Warren</i> , 129 F. 2d 43 (App. D. C.), certiorari denied, 317 U. S. 663.....	11
<i>Federal Power Commission v. Arkansas Power & Light Company</i> , 330 U. S. 802, reversing 156 F. 2d 821 (App. D. C.).....	6
<i>Gates v. Woods</i> , 169 F. 2d 440 (C. C. A. 4th).....	15
<i>Hoffman v. Apostolic Works, Inc.</i> , 3 OPA Op. and Dec. 5121.....	17

	Page
<i>Koster v. Turchi</i> (C. C. A. 3d), decided February 24, 1949, not yet reported.....	8
<i>Macauley v. Waterman S. S. Corp.</i> , 327 U. S. 540.....	6, 9, 15
<i>Miles Laboratories v. Federal Trade Commission</i> , 140 F. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752.....	6
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41.....	6
<i>Perkins v. Lukens Steel Company</i> , 310 U. S. 113.....	16
<i>Petroleum Company v. Commission</i> , 304 U. S. 209.....	16
<i>Shields v. Utah Idaho Railroad Company</i> , 305 U. S. 177.....	14
<i>United States v. Ruzicka</i> , 329 U. S. 287.....	9
<i>Utah Fuel Company v. National Bituminous Coal Commission</i> , 101 F. 2d 426 (App. D. C.).....	6, 11
<i>Wade v. Stimson</i> , 65 F. Supp. 277 (D. D. C.), affirmed 331 U. S. 493..	6
<i>William B. Schwarz (In the Matter of)</i> , 4 OPA Op. and Dec. 3088....	17
<i>Woods v. Benson Hotel Corp.</i> , 75 F. Supp. 743 (D. C. Minn.), affirmed 168 F. 2d 694 (C. C. A. 8th).....	3
Miscellaneous:	
Attorney General's Manual on the Administrative Procedure Act, page 103.....	11
Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 37, 229-230.....	11

In the United States Court of Appeals for the Ninth Circuit

No. 12118

FRANK W. BABCOCK, APPELLANT

v.

BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT
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EXPEDITER, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE CENTRAL DIVISION OF THE SOUTHERN DISTRICT
OF CALIFORNIA*

SUPPLEMENTAL BRIEF OF APPELLEE

INTRODUCTION

This brief is in the nature of a reply brief because the Court on December 20, 1948, ordered appellant to file a brief on the merits in ten days and appellee to file his reply within ten days thereafter. Appellant filed no brief until this Court's order of February 21, 1949. Appellee, however, filed a brief within the time originally specified. Appellee is now in receipt of appellant's brief and feels that his original brief, based on appellant's Statement of Points on Appeal, answers most of appellant's arguments. This supplemental brief, therefore, will endeavor merely to empha-

(1)

size those portions of appellee's original brief which refute appellant's contentions and such additional material as will round out the arguments there presented.

In substance, appellant asserts five principal grounds for reversing the judgment below. They are:

1. That Section 202 (c) of the Housing and Rent Act of 1947, as amended, is self-executing.

2. That the Court has equitable jurisdiction under the Declaratory Judgment Act even though appellant has failed to exhaust his administrative remedies.

3. That under the circumstances of the case compliance with the rule requiring exhaustion of administrative remedies, will constitute a denial of due process because of appellant's alleged inability to make the necessary escrow deposit.

4. That the Court erred in finding that appellee was authorized to issue orders fixing maximum rents applicable to the premises and in fixing such orders to determine whether the premises were or were not controlled and in finding that the notices of proceedings issued by appellee were authorized by Section 840.7 of the Revised Procedural Regulation.

5. That the Court abused its discretion in denying appellant's motion for a preliminary injunction.

These contentions will be considered in order.

ARGUMENT

I

There is no merit to appellant's contention that Section 202 (c) of the Housing and Rent Act of 1947 is self-executing

The Housing Expediter is entrusted with the responsibility of administering the Housing and Rent

Act of 1947, as amended. In so doing he must determine preliminarily whether or not specific housing accommodations are decontrolled. A Court has no jurisdiction to interfere with this preliminary determination.

The appellant argues that the provisions of Section 202 (c) of the Housing and Rent Act of 1947, as amended, are self-executing. It is agreed that if the Housing Expediter concurred in appellant's claim that his property was decontrolled there would be no action required on the part of appellant to establish that fact. But that is very different from a determination that the Housing Expediter may not, in the course of his administration of the rent control program, consider whether or not particular housing accommodations are subject to rent control.

The Housing Expediter is the officer entrusted with administering the powers, functions and duties prescribed under Title II of the Housing and Rent Act of 1947, as amended, which contains the rent control provisions. He is authorized to prevent the collection of rents in excess of those authorized by the Act. In exercising his authority to enforce rent control he must necessarily determine which housing accommodations are and which are not subject thereto. For this purpose Section 204 (d) of the Act grants him the power to issue appropriate regulations. See *Woods v. Benson Hotel Corporation*, 75 F. Supp. 743 (D. C. Minn.) affirmed on different grounds, 168 F. 2d 694 (C. C. A. 8th).

The District Court in the *Benson Hotel* case held that Section 202 (c) as it applied to hotels was not

self-operating and that the Housing Expediter was authorized to issue regulations to carry out the duties conferred by the Act. The fact that the Housing Expediter has subsequently relaxed the regulations with respect to hotels does not alter the applicability of the case to those regulations which remain. The Court also held that it would not interfere with the Housing Expediter's administrative action in issuing an official interpretation of the Act and Regulations. The reasoning in this case is applicable to all the exemptions under Section 202 (c). The Court said, at p. 747:

Section 202 (c) (1) excludes from "controlled housing accommodations" those establishments meeting certain requirements. Defendant claims that it meets the statutory test and that therefore the Housing Expediter has no jurisdiction at all with respect to the Hotel Leamington. However, by the express language of Section 204 (d) "the Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c)." This express reference to 202 (c) when coupled with the wording of that section makes it apparent that Congress intended to give the Expediter authority to issue regulations so as to make the section more specific in view of the policy and purposes of the Act. Furthermore, it authorizes the Expediter, if he deems it advisable (as he has), to require an orderly process of decontrol; that is, those who believe themselves within the exception of section 202

(c) can be required to file applications with the Expediter, who must approve them before decontrol is effectuated (or if approval is improperly denied, relief may be had by proper judicial proceedings). Such a requirement by the Expediter does not seem onerous, objectionable, or a transgression of his statutory authority. The only alternative would be to leave each person, if he believes himself to be decontrolled, to act at his peril. There would be no administrative procedure to which he could have recourse to determine his rights. Such a policy would be chaotic in effect and the policing staff of the Expediter would have to be greatly enlarged in order to obtain even a semblance of compliance with the law. It may well be a burden to many persons to continually fill out the many forms required by governmental agencies, but that burden is the price of living in a society that has determined to exercise some degree of control over economic affairs. It is not for this court to negate that policy, at least in the case at bar.

To echo Judge Joyce if there were no administrative procedure for determining that housing accommodations are not decontrolled, the result would be chaotic.

II

There is no merit to appellant's contention that the court has equitable jurisdiction under the Declaratory Judgment Act even though appellant has failed to exhaust his administrative remedies

As was indicated in the main brief (pp. 10 to 19), the attempt of appellant to secure judicial intervention in this case "is at war with the long-settled

rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51, and cases cited; *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540, 543; *Aircraft & Diesel Corp. v. Hirsch*, 331 U. S. 752; *Federal Power Commission v. Arkansas Power & Light Company*, 330 U. S. 802, reversing 156 F. 2d 821 (App. D. C.); *Wade v. Stimson*, 65 F. Supp. 277 (D. D. C.), affirmed 331 U. S. 493). This "long-settled rule" is applicable equally whether the administrative remedy be "exclusive" or merely "preliminary" to judicial determination. *Aircraft & Diesel Corp. v. Hirsch*, *supra*, 331 U. S. at pp. 767, 773. As Chief Justice Groner, speaking for the Court of Appeals for the District of Columbia, has said: "On no subject is the opinion of that Court [Supreme Court], as I view it, more definitely fixed than it is on the lack of power of the courts to inject themselves or be injected into proceedings which Congress has committed to the primary jurisdiction of administrative agencies" (*Miles Laboratories v. Federal Trade Commission*, 140 F. 2d 683, 685 (App. D. C.), certiorari denied, 322 U. S. 752; see, also, *Utah Fuel Company v. National Bituminous Coal Commission*, 101 F. 2d 426 (App. D. C.)).

The circumstances in the case at bar plainly call for the application of this rule. In the language of the Supreme Court: "The very purpose of providing either an exclusive or an initial and preliminary determination is to secure the administrative judgment

either, in the one case, in substitution for judicial decision, or in the other, as foundation for or perchance to make unnecessary later judicial proceedings" (*Aircraft & Diesel Corp. v. Hirsch, supra*, at p. 767. As stated by the Court of Appeals for the District of Columbia: "To permit judicial review, either by injunction or by declaratory judgment, of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings and would render orderly administrative procedure impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies. That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regrettable but not controlling factor under such circumstances" (*Utah Fuel Company v. National Bituminous Coal Commission, supra*, 101 F. 2d at p. 426.)

In the case of *Arkansas Power & Light Company v. Federal Power Commission, supra*, the plaintiff utility company attempted to establish whether the Arkansas Public Service Commission or the Federal Power Commission had jurisdiction over its accounts, since each asserted it. Both Commissions were made defendants in a declaratory judgment suit. The District Court of the United States for the District of Columbia dismissed the complaint for lack of jurisdiction of the subject matter (60 F. Supp. 907).

On appeal to the United States Court of Appeals (156 F. 2d 821), that Court reversed, holding that there was an actual controversy over which the District Court had jurisdiction under the Declaratory Judgment Act. The Supreme Court granted certiorari, and in a per curiam opinion (330 U. S. 802) reversed the Court of Appeals in these words: "Judgment reversed on the ground that respondent has failed to exhaust its administrative remedies. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540." The dilemma of a corporation subject to conflicting orders by independent commissions was much more serious than that of appellant, but the Supreme Court relegated it to the administrative route.

In *Koster v. Turchi* (C. C. A. 3d), decided February 24, 1949, the rule requiring exhaustion of administrative remedies was applied to a class suit by a group of tenants seeking a mandatory injunction to restrain the enforcement of certain rent orders increasing the rents of all tenants in the housing project. In this action, the Area Rent Director of Philadelphia and the City of Philadelphia were co-defendants. After determining that the District Court lacked jurisdiction to entertain the action because the statutory minimum of \$3,000 was not involved, the Court of Appeals said the following:

It is also apparent that the appellants have failed to exhaust their administrative remedy. *Gates v. Woods*, 4 Cir., 169 F. 2d 440; cf. *Lockerty v. Phillips*, 319 U. S. 182, 188. Recourse to the procedure outlined in Section

840.5 of the Rent Procedural Regulation 1 (12 F. R. 5916) for a tenant applying for decrease in maximum rent would have materially assisted in the orderly disposition of appellants' problems and might well have eliminated this litigation.

See also, *Abbet Holding Corporation v. Woods*, 167 F. 2d 472 (E. C. A.); *United States v. Ruzicka*, 329 U. S. 287.

To allow appellant to resort to the courts at this stage of the unfinished administrative proceedings would burden the courts with a problem which might well be unnecessary to decide, for it cannot be assumed at this stage that the administrative proceedings will result in a determination against appellant (cf. *Anderson v. Schwellenbach*, 70 F. Supp. 14 (N. D. Cal., 3 Judge Court)).

That plaintiff proceeds by way of declaratory judgment rather than by injunction places it in no better position insofar as the relief here sought is concerned. "The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment" (*Macauley v. Waterman S. S. Corp.*, *supra*, 327 U. S. at p. 545, fn. 4; see, too, *Aircraft & Diesel Corp. v. Hirsch*, *supra*).

In *Aircraft & Diesel Corp. v. Hirsch*, *supra*, the Supreme Court sustained the dismissal of a suit for a declaratory judgment on similar grounds. There, a determination as to the constitutionality of the Renegotiation Acts was sought while proceedings were pending in the Tax Court. The Supreme Court dismissed the suit, holding that administrative remedies

must be exhausted before recourse could be had to the courts. It said (at p. 767):

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded the administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

In a well reasoned opinion the Fifth Circuit Court said the following on this point: "The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin" (*Bradley*

Lumber Company v. National Labor Relations Board, 84 F. 2d 97, 100 (C. C. A. 5th), certiorari denied, 299 U. S. 559, quoted with approval in *Utah Fuel Company v. National Bituminous Coal Commission*, *supra*, 101 F. 2d at p. 431; see, also, *Doehler Metal Furniture Company v. Warren*, 129 F. 2d 43, 45 (App. D. C.), certiorari denied, 317 U. S. 663; *Aircraft & Diesel Corp. v. Hirsch*, *supra*). As associate Justice (now Mr. Chief Justice) Vinson stated in the *Doehler* case, *supra*; "It is well enough to be attuned to the use of new remedial concepts, but it is something else to increase jurisdiction beyond the other provisions of law by a clever use of remedies" (at p. 46).

The soundness of the doctrine requiring the exhaustion of administrative remedies was also reaffirmed by Congress in enacting the Administrative Procedure Act (60 Stat. 238, 5 U. S. C. 1001, et seq.). While making comprehensive changes in the law governing the operations of Federal administrative agencies, Congress saw fit to leave virtually untouched existing rules relating to judicial review of administrative action. See, Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Congress, 2d Session, page 229-230. In particular, as the Attorney General has pointed out, Section 10 (c) "embodies the doctrine of exhaustion of administrative remedies. H. R. Rep., p. 55, fn. 21 (Sen. Doc., p. 289)." Attorney General's Manual on the Administrative Procedure Act, p. 103. Thus, the Section was "designed 'to negative any intention to make reviewable merely preliminary or procedural

orders where there is a subsequent and adequate remedy at law available, as is presently the rule.' Senate Comparative Print, June 1945, p. 19 (Sen. Doc., p. 37)."

In providing in Section 10 (a) of that Act that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof," Congress limited the right to review to "such wrong as particular statutes and the courts have recognized as constituting ground for judicial review * * * . The Attorney General advised the Senate Committee on the Judiciary of his understanding that Section 10 (a) was a restatement of existing law. More specifically he indicated his understanding that Section 10 (a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *The Chicago Junction Case*, 264 U. S. 258 (1924); *Sprunt & Son v. United States*, 281 U. S. 249 (1930); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); and *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470 (1940). Sen. Rep., p. 44 (Sen. Doc. p. 230). This construction of section 10 (a) was not questioned or contradicted in the legislative history" (Attorney General's Manual on the Administrative Procedure Act, Prepared by the United States Department of Justice, Tom C. Clark, Attorney General, p. 96, 1947). In view of the foregoing there is no merit whatever to appellant's contention that he is relieved of ex-

hausting administrative remedies because he has resorted to the Declaratory Judgment Act.

When we compare the nebulous nature of the "injury" appellant might suffer by exhausting his administrative remedies with the burden that would be placed upon the judiciary and administrative agencies if appellant's contention were accepted, there can be no question where the choice lies.

Section 202 (c) provides for decontrol of hotels, motor courts, trailer spaces, tourist homes, new construction, converted units, units vacant for specified purposes, and units not previously rented. If appellant is right in his contention that the Court below should take jurisdiction to determine whether his accommodations are decontrolled, then every one of the thousands of other persons who own any of the accommodations referred to in the decontrol provisions of Section 202 (c) would be relieved of exhausting their administrative remedies also, and could insist that the courts make the initial determination of their coverage. If that were the rule, we dare say that the courts would have time for little else than to decide questions relating to a person's claim of decontrol under the Housing and Rent Act of 1947, as amended. As a matter of sound law and practical judicial administration, appellant's contention on this score cannot be sustained as a basis for departing from the established rule that courts of equity will not lend their hand until the prescribed administrative remedies have been exhausted.

Appellant states that there have been hundreds of lawsuits brought and tried since July 1, 1947, in

which the status of housing accommodations was the major issue, and that therefore the Expediter has conceded the jurisdiction of the courts to determine the question of decontrol. Since the Housing Expediter has not been a party to such suits, it is difficult to understand how he could have conceded anything in them. However, the fact that in a proper suit in which the Expediter is not concerned, a court has jurisdiction to determine the fact of control or decontrol has no bearing on the question here at issue, namely, the right of a court to entertain jurisdiction of appellant's suit to restrain appellee from performing his functions as Housing Expediter when plaintiff has not exhausted his administrative remedies and has a plain and adequate remedy at law.

Appellant cites the case of *Columbia Broadcasting System v. United States*, 316 U. S. 407. In that case, Columbia brought an action to have an order of the Federal Communications Commission set aside. The Act by virtue of which the Federal Communications Commission issued the order provided specifically that it could be attacked in court in accordance with the procedure followed by Columbia. The issue was whether the order came within the statutory provision, not whether Columbia might obtain a declaratory judgment.

Appellant also cites *Shields v. Utah Idaho Railroad Company*, 305 U. S. 177, in which the Court did review a determination of status by the Interstate Commerce Commission. However, in that case, plaintiff sued after exhaustion of its administrative

remedies. The Supreme Court approved the refusal of the District Court to set aside the Commission's action since it was based on evidence adduced during appropriate administrative proceedings. This case illustrates appellee's position exactly. If appellant exhausts his administrative remedies, he will be entitled to a court decision as to the propriety of the action of the Housing Expediter.

Appellant's attempt to distinguish *Gates v. Woods*, 169 F. 2d 440 (C. C. A. 4th), cited in appellee's brief, is not convincing. The Housing Expediter is not attempting to "control the process of decontrol," but to determine whether housing accommodations are controlled and therefore is acting within his authorized jurisdiction and consistent with the authority conferred by Congress.

III

There is no merit to the contention that under the circumstances of the case compliance with the rule requiring exhaustion of administrative remedies will constitute denial of due process because of appellant's alleged inability to make the necessary escrow deposit

As stated under Point II, *supra*, appellee's brief covers this point at pp. 10-19. Appellant contends that since he cannot secure a stay of appellee's rent reduction orders unless he deposits the amount of the overcharges in escrow his remedy at law is inadequate. This particular provision has been sustained in the New York cases cited in appellant's brief (p. 12). But as is evident in the quotation from *Macauley v. Waterman* set out at page 15 of appellee's original brief mere cost to appellant does not render a remedy

at law inadequate. In *Aircraft & Diesel Corp. v. Hirsch, supra*, at p. 5 the amount of money withheld from Aircraft & Diesel Corporation was \$204,000 and yet the Court held that did not militate against the need for exhausting administrative remedies. See, also, *Petroleum Co. v. Commission*, 304 U. S. 209; *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *Bradley Lumber Co. v. National Labor Relations Board*, 84 F. 2d 97, 100 (C. C. A. 5th), certiorari denied 299 U. S. 559.

It is difficult to ascertain the bearing of *Commonwealth v. O'Keefe*, 298 Pa. 169, 148 Atl. 73, cited by appellant on the question under discussion. There the defendant was arrested and tried on the same day and clearly was deprived of his constitutional rights, which is clearly not the case here.

IV

There is no merit to the contention that the Court erred in finding that appellee was authorized to issue orders fixing maximum rents applicable to the premises and, in fixing such orders, to determine whether the premises were or were not controlled and in finding that the Notices of Proceedings issued by appellee were authorized by Section 840.7 of Revised Rent Procedural Regulation

Appellee agrees with appellant that Congress was endeavoring to encourage landlords to place *additional* housing facilities on the rental market. The question is whether these were additional facilities under the statute. This is a question to be determined initially by the administrative agency entrusted with rent control and enforcement (see Points I and II, *supra*). The cited opinions and decisions of the Office of Price Administration and the state court decisions cited

by appellant in his brief (pp. 18-20) do not have any bearing on this question except for *In the Matter of William B. Schwarz*, 4 OPA Opinions and Decisions 3088. There it was agreed, contrary to appellant's reading, that all of the premises except the janitor's apartment had been previously rented because of their Army occupancy.

The statements quoted by appellant concerning the relationship between a college and its students regarding matters of discipline are of little help in determining the problem whether a student is a tenant within the meaning of the Housing and Rent Act of 1947, as amended. The unusual facts surrounding *Hoffman v. Apostolic Works, Incorporated*, 3 OPA Opinions and Decisions 5121 distinguish it from the usual college-student situation and deprive it of any weight.

In any event, these are matters to be argued to the Housing Expediter in the administrative proceedings and will undoubtedly be given the weight that they deserve. This Court has before it solely the problem of determining whether the appellee's motion to dismiss was properly granted, not to decide the case upon its merits.

V

There is no merit to the contention that the court abused its discretion in denying appellant's motion for a preliminary injunction

Appellant's argument is addressed at best to the Court's discretion, and as appellee's brief, Points VI and IX, pp. 19-21 shows the Court's discretion far

from being abused, was properly exercised in this case.

CONCLUSION

It is therefore respectfully submitted that the action of the District Court in dismissing the complaint and denying a preliminary injunction is correct and the judgment should be affirmed.

ED DUPREE,
General Counsel,

HUGO V. PRUCHA,
Assistant General Counsel,

NATHAN SIEGEL,
Special Litigation Attorney,

LOUISE F. MCCARTHY,
Special Litigation Attorney,
Office of the Housing Expediter,
Office of the General Counsel,
Temporary "E" Building, Washington 25, D. C.

No. 12119

United States
Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

JACK ANDRADE, Claimant of One 1947 Cadillac
Automobile, Motor No. 8431298, Serial No.
8431298, its tools and appurtenances,

Appellee.

Apostles on Appeal

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED
MAR - 4 1949

PAUL P. O'BRIEN,
CLERK

No. 12119

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Appellant,
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JACK ANDRADE, Claimant of One 1947 Cadillac
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amendments to Findings of Fact and Conclusions of Law Proposed by Intervener.....	25
Answer	10
Exhibit A-1—Contract of Conditional Sale, Oct. 24, 1947, Jack Andrade to Everett Brown	13
Assignment of Contract to Pacific Finance Co.	17
Exhibit B—Repurchase Agreement dated May 24, 1948, Jack Andrade from Pacific Finance Co.	21
Appeal:	
Assignment of Errors on.....	36
Certificate of Clerk to Apostles on.....	40
Citation on	37, 41
Designation of Apostles on (D.C.).....	39
Designation of Contents of Record on (U.S.C.A.)	121
Notice of	33
Order Allowing	35
Order Extending Time to Docket.....	38

	PAGE
Order Extending Time to Docket (U.S.C.A.)	119
Petition for	34
Statement of Points on (U.S.C.A.).....	121
Assignment of Errors.....	36
Certificate of Clerk to Apostles on Appeal....	40
Citation on Appeal.....	37, 41
Designation of Apostles on Appeal:	
Libelant's (D.C.)	39
Appellant's (U.S.C.A.)	121
Findings of Fact and Conclusions of Law....	22
Proposed Amendments to	25
Libel of Information.....	2
Motion to Intervene as Defendant.....	7
Names and Addresses of Proctors.....	1
Notice of Entry of Judgment.....	32
Notice of Appeal.....	33
Order Allowing Appeal.....	35
Order Denying Forfeiture.....	31
Order Extending Time to Docket Appeal (DC)	38
Order Extending Time to Docket Appeal (U.S.C.A.)	119
Order Granting Leave to File Answer in Intervention	9
Petition for Appeal.....	34

Statement of Points on Appeal (U.S.C.A.)... 121

Transcript of Testimony and Proceedings.... 42

Exhibit for Defendant:

A—Abstract of Motor Vehicle Registration,
Transfer of Ownership Interest from Jack
Andrade to Everett Brown, Oct. 24, 1947 98

Purchaser's Credit Statement, Oct. 24, 1947 99

Letter dated May 25, 1948, from Pacific
Finance Co. Acknowledging Receipt and
Reassignment of Contract to Jack Andrade 100

Exhibits for the United States:

1—Envelopes Containing Narcotics (Descrip-
tion) dated Feb. 22, 1948..... 91

2—Envelopes Containing Narcotics (Descrip-
tion) dated 2/24/48..... 92

3—Envelopes Containing Narcotics (Descrip-
tion) dated 2/26/48..... 93

4—Envelopes Containing Narcotics (Descrip-
tion) dated 3/23/48..... 94

5—California Department of Motor Vehicles
Registration Card issued to Everett
Brown 47

6—Similar to Exhibit No. 5, see page..... 47

7—Documents of Department of Motor Ve-
hicles re Cadillac Sedanette.....49, 57

8—Similar to Exhibit No. 7, see pages....49, 57

Witness for Claimant:

DeLong, Mrs. Edwina	
—direct	107
—cross	111

Witnesses for the United States:

Andrade, Jack	
—direct	112
Coffill, George	
—direct	77
—cross	95
DeLong, Edwina	
—direct	113
Holmes, Shelbourne	
—direct	45
McGuire, Thomas E.	
—direct	59
—cross	76
—recalled, direct	96
Puccinelli, Boyd	
—direct	105

Warrant of Seizure and Monition.....	4
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NAMES AND ADDRESSES OF PROCTORS

For Libelant and Appellant:

FRANK J. HENNESSY, Esq.,
United States Attorney,

JOSEPH KARESH, Esq.,
Assistant United States Attorney,

ROBERT F. PECKHAM, Esq.,
Assistant United States Attorney,
San Francisco, California.

For Intervener and Appellee:

FRED A. WATKINS, Esq.,
111 Sutter Street,
San Francisco 4, California.

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 25173-R

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE 1947 CADILLAC SEDANETTE AUTOMO-
BILE, Motor No. 8431298, Serial No. 8431298,
its tools and appurtenances,

Respondent.

LIBEL OF INFORMATION

Now comes Frank J. Hennessy, United States
Attorney for the Northern District of California,
and respectfully presents to the Court the follow-
ing:

I.

That on or about the 24th day of March, 1948,
in the City and County of San Francisco, State
of California, and within the jurisdiction of the
United States and of this Honorable Court, duly
authorized and acting agents of the Bureau of
Narcotics, Treasury Department of the United
States, seized a certain automobile, to-wit, One
1947 Cadillac Sedanette Automobile, Motor No.
8431298, Serial No. 8431298, [1*] its tools and ap-
purtenances, which said automobile had been and
was being unlawfully used in violation of Section
781, Title 49, United States Code, as follows, to-

* Page numbering appearing at foot of page of original certified
Transcript of Record.

wit: (a) that said automobile had been, and was being used to transport, carry and convey certain contraband articles, to-wit, narcotic drugs, which did not bear appropriate tax-paid internal revenue stamps as required by law or regulations; (b) that the said contraband articles had been possessed and concealed and were then and there possessed and concealed in or upon said automobile and in or upon the person of Everett Brown while in or upon said automobile; (c) that the said automobile had been and was being used to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange and giving away of the said contraband articles.

II.

That by reason of the premises the said automobile, its tools and appurtenances, has become and is subject to forfeiture and condemnation pursuant to the provisions of Section 782, Title 49, United States Code; that the said automobile, its tools and appurtenances, are presently in the custody of the District Supervisor of the Bureau of Narcotics, United States Treasury Department, and are held within the jurisdiction of this Court as forfeited to the United States for the causes above set forth.

Wherefore, the United States Attorney prays that the usual process issue against the said automobile, its tools and appurtenances, and that all persons interested in and concerned in the said automobile, its tools and appurtenances, be cited to appear and show cause why such forfeiture should not be adjudged and that all due proceedings [2]

being had therein, this Honorable Court may be pleased to condemn the said automobile, its tools and appurtenances, as forfeited to the United States, and that a judgment condemning the said automobile, its tools and appurtenances, may thereupon be made and entered, and that the said judgment may also order the same to be delivered to the United States Treasury Department, Bureau of Narcotics, District No. 14 thereof, and for such other and further judgment and order as to the Court may seem proper in the premises.

/s/ FRANK J. HENNESSY,

United States Attorney.

[Endorsed]: Filed May 7, 1948. [3]

[Title of District Court and Cause.]

WARRANT OF SEIZURE AND MONITION

The President of the United States of America.
To the Marshal of the Northern District of California—Greenings:

Whereas, on the 7th day of May, A.D. 1948, a Libel was filed in the United States District Court for the Northern District of California, by Frank J. Hennessy, United States attorney for said District, on behalf of the United States, against One 1947 Cadillac Sedanette Automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, Respondent, and praying that all persons interested in said goods, wares, and merchandise may be cited in general and special, to answer the premises; and due proceedings being had, that the

said goods, wares, and merchandise may, for the causes in said Libel mentioned, be condemned as forfeited to the use of the United States.

You Are Therefore Hereby Commanded to attach the said goods, wares, and merchandise, and to detain the same in your custody until the further order of said Court respecting the same; and to give notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned as forfeited to the use of the United States, pursuant to the prayer of said Libel that they be and appear before the said Court, at the city of San Francisco on the 18th day of May, A.D. 1948, at 10 a.m. the same being the return of this Monition if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf, and that as to any person not so appearing default and condemnation will be ordered. And what you have done in the premises, do you then and there make return thereof, together with this writ.

Witness the Honorable,

(Seal)

MICHAEL J. ROCHE,

United States District Judge,
at San Francisco, California, this 7th day of May,
A.D. 1948.

C. W. CALBREATH,

Clerk,

By C. A. TROLLIET,

Deputy Clerk. [4]

MARSHAL'S RETURN

In obedience to the within Monition, I attached the One 1947 Cadillac Sedanette, Motor No. 8431298, Serial No. 8431298, et al, therein described, on the 10th day of May, 1948, and have given notice to all persons claiming the same or having an interest in said cause, that this Court will, on 18 day of May, 1948, at 10 a.m. (if that be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named 1947 Cadillac. I further return that I handed to and left with Mr. A. Lerner in charge a copy of this Writ, at San Francisco, California, on the 10th day of May, 1948.

* * * *

San Francisco, California, May 10, 1948.

GEORGE VICE,

United States Marshal,

By HERBERT R. COLE,

Deputy.

[Endorsed]: Filed May 11, 1948. [5]

[Title of District Court and Cause.]

MOTION TO INTERVENE AS DEFENDANT

To the Judges of the District Court of the United States for the Southern Division, Northern District of California:

Jack Andrade, your petitioner, respectfully alleges and shows as follows:

I.

Jack Andrade, your petitioner, is the owner of a 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, and makes claim to said car.

II.

That the above-entitled cause was commenced in this Court by the filing of complaint by the United States Attorney on behalf of the United States of America as libelant on May 7, 1948; that said action of libel of information is an action against the said 1947 Cadillac sedanette automobile hereinbefore referred to under a theory that one Everett Brown, in violation of Section 781, Title 49 United States Code, unlawfully used said automobile in that the said Everett Brown used said automobile to transport, carry and convey certain contraband articles, to-wit, narcotic drugs, which did not bear appropriate tax-paid internal revenue stamps as required by law or regulations, and that said contraband articles had been possessed or concealed and were then and there possessed or concealed in or upon said automobile and in or upon the per-

son of said Everett Brown while in or upon said automobile, and that said automobile had been and was being used to facilitate the transportation, carriage conveyance, concealment, receipt, possession purchase, sale, barter, exchange and giving away of said contraband articles. [6]

III.

That pursuant to the said alleged violation by one Everett Brown of the said laws of the United States, to-wit, Title 49, United States Code, the acting agents of the Bureau of Narcotics, Treasury Department of the United States, seized that certain automobile, one 1947 Cadillac sedanette, Motor No. 8431298.

IV.

That petitioner, Jack Andrade, has no knowledge, or had no knowledge, of any alleged use of said car, to-wit, one 1947 Cadillac sedanette, Motor No. 8431298, in violation of Title 49, United States Code, or in violation of any other law of the United States; that petitioner is informed, and therefore alleges, that said 1947 Cadillac sedanette was not at any time used in violation of Title 49, United States Code; that petitioner has a right to intervene in the above-entitled litigation under Rule 24 of the Federal Code of Civil Procedure; that the applicant and petitioner so situated as to be adversely affected by the disposition or other distribution of property in the custody of the Court or of an officer thereof; that your petitioner claims to be and is the owner of the automobile now under custody of the Court or its officers; that your pe-

itioner was on or about the 24th day of October, 1947, the owner of said automobile, and on said day sold the said automobile to one Everett Brown under a contract of conditional sale, which said contract was assigned to the Pacific Finance Corporation of California, and which said contract was repurchased by your petitioner from said Pacific Finance Corporation on or about the 25th day of May, 1948.

Wherefore, petitioner prays that this Court make an order granting leave to petitioner to intervene herein as a defendant, with leave to file the attached answer herein, and for such other and further relief as to this Court seems just.

Dated: July 1, 1948.

FRED A. WATKINS,
Proctor for Petitioner.

[Endorsed]: Filed July 6, 1948. [7]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE
ANSWER IN INTERVENTION

The above-entitled matter came on regularly to be heard this day on the motion of Jack Andrade, applicant in intervention, appearing by counsel, Fred A. Watkins, Esq.; of counsel, Bernard B. Glackfeld, Esq., and the office of the United States Attorney appearing on behalf of the United States of America, Robert F. Peckham, Esq., counsel, and evidence being adduced therein, and the Court be-

V.

That your intervener is informed and believes, and therefore alleges, that neither, on March 24, 1948, nor from October 4, 1947, to date hereof, was the said Cadillac sedanette automobile used in violation of Title 49, United States Code, for any unlawful or illegal purpose in the transportation, carriage or conveyance of certain contraband articles, to-wit, narcotic drugs, not bearing appropriate tax-paid internal revenue stamps, nor that said car possessed and concealed or that its occupant, Everett Brown, while in or around said automobile, possessed or concealed any of said contraband narcotic drugs, nor that said automobile was used to facilitate the transportation carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange and giving away of said contraband articles.

VI.

That your intervener alleges that said Everett Brown is a stranger to intervener, and said intervener has no connection or relationship with any alleged violation of Title 49, United States Code; that your intervener has an interest in the said automobile to the extent of Three Thousand One Hundred Twenty-three Dollars and Ten Cents (\$3,123.10); that your intervener has acted in good faith in all respects in the matter herein; that your intervener is willing and ready to post bond and/or cash as security for any costs incurred by libellant herein in the event your intervener allows a default judgment to be rendered against him.

Wherefore, intervener prays that the Court order the 1947 Cadillac sedanette automobile, Motor No. 8431298, to be released by the District Supervisor of the Bureau of Narcotics, United States Treasury Department, [10] and delivered up to your intervener, and for such other and further relief.

JACK ANDRADE,
Intervener.

(Verification.) [11]

EXHIBIT A-1

CONTRACT OF CONDITIONAL SALE
(California)

The undersigned Seller hereby sells, and the undersigned Everett Brown, Purchaser, hereby purchases for the time price and subject to the terms and conditions hereinafter set forth, the following property, delivery and acceptance of which in good order is hereby acknowledged by Purchaser, viz:

Year model: 47. Trade name: Cadillac. Type of body, if truck, state tonnage: 62 sedanette. Serial No.: same. Motor No.: 8431298. State license number: 99N205. New or used: U. No. of cyls.: 8.

Cash Selling Price: (Inc. Accessories \$5200.00, Sales Tax \$156.00) \$5356.00(a).

Down Payment: Cash \$2307.00.

Agreed Net Value Trade-in: \$2307.00(b).

Amount Unpaid on Cash Price (a) less (b):
\$3049.00(c).

The Purchaser makes application to the Seller to insure said property in Companies acceptable to Seller for the following coverages and to include

the premiums therefor in the balance due under this contract. Said insurance to become effective as of the date of execution of this contract and to expire

* * * *

Fire & Theft, 24 Mos.; Prem. \$46.20.

Vendor's single int., 24 Mos.; Prem. \$70.00.

Conversion, 24 Mos.; Prem. \$70.00.

Total Insurance Premiums \$186.20 (d).

Registration and Title Fees \$1.00 (e).

Unpaid Balance, (c) plus (d) plus (e)
\$3236.20 (f).

Time Price Differential \$730.48 (g).

Total Contract Balance Due Seller From Purchaser \$3966.68 (h).

Which Purchaser agrees to pay in installments of \$165.32, on the 4th day of each succeeding month for a period of 24 months, beginning Dec. 4 — 47, together with additional payments as follows: at the office of Pacific Finance Corporation of California, with interest thereon after maturity at the highest legal rate, together with a reasonable collection fee in the event of default, and if the services of an attorney be employed for the enforcement of any of the obligations of Purchaser, or the rights of Seller, either by suit or otherwise, Purchaser agrees to pay reasonable attorney's fees.

Executed in triplicate, one copy of which was delivered to and retained by Purchaser this 24th day of Oct., 1947, at S. F.

1. Title to said property shall not pass to Purchaser until all sums due under this contract are

fully paid in cash. Payment to any one other than Pacific Finance Corporation of California does not constitute payment hereunder.

2. No warranties, express or implied, have been made by the Seller unless endorsed hereon in writing.

3. Purchaser shall keep said property free of all taxes, liens and encumbrances; shall not use same illegally, improperly, or for hire; shall not remove same from the state or transfer any interest therein without written consent of the Seller. Seller may insure said property against fire and theft, or any accidental physical damage to the property to protect Purchaser, Seller, or Seller's assignee. Purchaser agrees to pay the premium upon demand. The proceeds of any insurance, whether paid by reason of loss, injury, returned premium, or otherwise, shall be applied toward the replacement of the property or payment of this obligation, at the option of Seller.

4. Time is of the essence of this contract, and if Purchaser default in complying with any of the terms hereof, Seller, at his option, and without notice to Purchaser, may declare the whole amount unpaid hereunder immediately due and payable, or Seller may take immediate possession of said property without demand (possession after default being unlawful), including any equipment or accessories thereto; and for this purpose Seller may enter upon the premises where said property may be and remove same. Seller may resell said property, so retaken, at public or private sale, without demand for performance, with or without notice

to Purchaser (if given, notice by mail to address below being sufficient), with or without having such property at place of sale, and upon such terms and in such manner as Seller may determine; Seller may bid at any public sale. From the proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing and selling such property, including a reasonable attorney's fee. The balance thereof shall be applied to amount due; in case of deficiency, Purchaser shall pay same with interest. Seller may take possession of any other property in above described motor vehicle at time of repossession and hold same temporarily for Purchaser without liability on the part of Seller. Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently.

5. No transfer, renewal, extension or assignment of this contract or any interest thereunder, or loss, injury or destruction of said property shall release the Purchaser from his obligation hereunder. Acceptance by the Seller of any payment required hereunder, after same is due, shall not constitute a waiver of this or any other provision of this contract. The seller is authorized to correct patent errors in this contract. Seller's assignee shall be entitled to all the rights of the Seller.

JACK ANDRADE,

Seller.

By /s/ E. HUBBY,

Secty.

/s/ EVERETT BROWN,

Purchaser.

ASSIGNMENT AND PURCHASE
AGREEMENT

San Francisco, Calif., 1947

For Value Received, I hereby sell and assign to Pacific Finance Corporation of California (hereinafter called the assignee) the above described contract and the property in said contract mentioned; and I guarantee, warrant and agree to defend the title of said property hereby conveyed against all lawful claims and demands whatsoever, except as against the rights of the purchaser set forth in said contract; and I agree that, if the assignee shall take possession of said property for failure of the purchaser to perform any of the conditions or requirements of said contract, and shall make delivery of the said property to my place of business within ninety (90) days after due date of the then unpaid installment longest overdue, I will pay to the assignee upon delivery, all installments then delinquent under the said contract, and will pay the balance remaining under the said contract, within thirty (30) days after such delivery; but no such delivery shall be required to be made to me if at the time of such taking possession I am no longer in the automobile business or am deemed by the assignee to be an unsafe risk, in either of which events the assignee shall have full right to make sale of said property as in said contract provided and I will upon demand pay to the assignee any and all sums provided in said contract to be paid by purchaser after sale; but if at the time the assignee makes demand on the purchaser or takes legal

steps for the possession of said property, any installment then due shall be more than forty-five (45) days delinquent or if said property is alleged by the assignee to have been stolen, embezzled, confiscated, or burned and if insurance be carried notice of loss is not filed with the insurer thereof within forty-five (45) days after the assignee is upon notice that such loss of the property is alleged to have occurred, then I shall stand relieved of all liability hereunder; and should the automobile be repossessed solely as the result of one accidental collision or overturning, then I shall be relieved of my liability hereunder up to the amount of the cost of repairing the damage done by this one collision or overturning only, not to exceed, however, the sound value of the property at the time of such collision or overturning; but should the property be lost as a result of theft, confiscation, or embezzlement, or be wholly or partially destroyed by fire or other casualty, if there be any sum still unpaid on said contract after applying upon the contract any insurance settlement received by the assignee therefor, then I agree to pay to said assignee such unpaid sum upon demand. I understand that title to said property remains in the assignee until the contract balance shall be fully paid, and I agree that in the event of my failure to pay the amounts herein agreed to be paid in the event of delivery of said property to my place of business, or in the event I am deemed by the assignee to be an unsafe risk, then in either event the assignee may take possession and make sale of the

said property as in the contract provided, and I agree to pay upon demand, all sums provided in said contract to be paid by purchaser after sale. In the event that an attorney is employed or suit is brought by said assignee to enforce any of my obligations under this assignment, then I agree to pay to such assignee a reasonable attorney's fee in such suit. I hereby consent that extensions of time of payment and changes of the terms of said contract may be made by the assignee without in any manner releasing me from liability, and I hereby waive presentment, demand, notice of non-payment, advertisement and notice of sale, and any other notice whatsoever and suit against the purchaser; and I agree that, as to the assignee, my obligation hereunder shall be enforceable even though the assignee's rights to enforce said contract or any provision thereof be suspended or impaired by any statute or otherwise. I hereby waive all statutes of limitation in any way affecting the time within which seller may enforce its rights hereunder and the defense thereof.

For the purpose of inducing the assignee to purchase the said contract and property, I make the following representations and warranties: that the information concerning the purchaser given on the blank provided for that purpose is truly set down therein as the same was given by said purchaser and that the information is true and correct as to the purchaser's address and occupation; that the said contract is a bona fide one and was actually executed by the person named therein as purchaser;

that said purchaser was of legal age and competent to execute said contract at the time of the execution thereof; that the property which is the subject of said contract is truly and accurately described therein; that said property has been delivered into the possession of the purchaser; that the amount recited in said contract as having been received upon the signing thereof as part of the purchase price of said property was actually paid in cash and/or by a motor vehicle received in trade at not more than its then cash value; that I have duly filed or recorded said contract in accordance with the laws of the state in which the buyer resides, and will apply immediately for the cause to be issued a certificate of title for said motor vehicle setting forth the title or interest of the assignee under said contract; that the amount owing upon said contract at the time of its execution is correctly stated therein; that there are no recoupments, counter-claims or set-offs on the part of said purchaser against the same; and that there have been no representations or warranties made to the said purchaser which are not contained in said contract, and that I have no information or reason to suspect, that any provision of the said contract will be violated, or that the purchaser is other than a good moral and financial risk.

Where the terms "installment then due" and "due date of the then unpaid installment," and similar terms are used herein in connection with provisions releasing the guarantor of liability, it

is understood and agreed that these terms refer to installments or payments due under the contract as extended by any extensions of time of payment made to the purchaser.

JACK ANDRADE,
Seller.

By E. HUBBY,
Secty.

* * * *

“EXHIBIT B”

Pacific Finance Corporation

928 Van Ness Avenue
San Francisco 9, California
TUxedo 5-4554

For Value Received we hereby sell and assign, without recourse, unto Jack Andrade the within contract signed by Everett Brown, as purchaser, covering 1947 Cadillac Sedanette, Motor Number 8431298.

PACIFIC FINANCE CORP.
OF CALIFORNIA,
By /s/ M. E. TEAGARDEN.

Dated at San Francisco, California, this 25th day of May, 1948.

Subscribed and sworn to before me this 25th day of May, 1948.

(Seal) /s/ JESSIE DOBBIN CROWLEY

[Endorsed]: Filed July 19, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial on the 13th day of August, 1948, and having been continued until the 27th day of August, 1948, before the above-entitled Court sitting without a jury, Joseph Karesh, Esq., and Robert Peckham, Esq., appearing for the libelant, United States of America, and Fred A. Watkins, Esq., appearing for intervener, Jack Andrade, and evidence, both oral and documentary having been introduced, and the cause submitted for decision, the Court now makes its findings of fact as follows: [12]

FINDINGS OF FACT

I.

That it is true that on or about the 24th day of March, 1948, in the City and County of San Francisco, State of California, duly authorized agents of the Bureau of Narcotics, Treasury Department of the United States, seized a certain automobile, to-wit, one 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances; that it is true that at said time said Cadillac sedanette was in the illegal possession of one Cato Barrow; that the said automobile, its tools and appurtenances are presently in the custody of the District Supervisor of the Bureau of Narcotics, United States Treasury Department.

II.

That on or about the 24th day of October, 1947, Jack Andrade was the owner of that certain 1947 Cadillac sedanette automobile, its tools and appurtenances, and that on said date Jack Andrade did sell said car, its tools and appurtenances under a conditional sales contract to one Everett Brown; that said contract of conditional sale was assigned on said date to the Pacific Finance Corporation of California; that said Everett Brown became in default under the terms of said conditional sales contract; that intervener Jack Andrade repurchased the 1947 Cadillac sedanette from the Pacific Finance Corporation, pursuant to a guaranty of payment agreement with said Finance Corporation, on or about the 25th day of May, 1948: that Jack Andrade is the legal owner of said Cadillac sedanette automobile.

III.

That on or about the 24th day of March, 1948, the Bureau of Narcotics agents, Treasury Department of the United States, seized that certain 1947 Cadillac sedanette automobile for an alleged violation of Title 49, Section 781, United States [13] Code, by one Cato Barrow; that Jack Andrade is a stranger to Cato Barrow and to Everett Brown; that Jack Andrade has acted in good faith, and when Jack Andrade sold the said Cadillac sedanette automobile to Everett Brown on the 27th day of October, 1947, said Everett Brown presented sufficient credit references by way of cash paid to Jack Andrade and by way of information to

Jack Andrade which indicated to Jack Andrade that said sale was one in the usual course of business of said Jack Andrade; that said Jack Andrade had no other relationship with Everett Brown than that necessary to consummate the sale of the Cadillac sedanette automobile on October 27, 1947.

IV.

That Everett Brown was not in possession of, nor ever in possession of, or in or about the said 1947 Cadillac sedanette automobile at any time when the Federal agents, Bureau of Narcotics, Treasury Department of the United States, seized said car for a violation of Title 49, Section 781, United States Code; that said Everett Brown did not at any time expressly or impliedly authorize Cato Barrow to have possession of said 1947 Cadillac sedanette automobile; that said Cato Barrow was in illegal possession of said 1947 Cadillac sedanette automobile on March 24, 1948, at the time the Federal agents, Bureau of Narcotics, Treasury Department of the United States, seized said car, nor at any other time.

V.

That Jack Andrade has at all times acted in good faith and in complete innocence in the sale of said Cadillac sedanette automobile to Everett Brown, and did have no, and has never had any, knowledge of the use of the said 1947 Cadillac sedanette automobile for any violation of Title 49, Section 781, United States Code, nor were there any circumstances sufficient to arouse the suspicions of a reasonable and prudent person. [14]

CONCLUSIONS OF LAW

As conclusions of law on the foregoing facts, the Court finds:

That Intervener Jack Andrade is entitled to possession of that 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, and that said Jack Andrade is entitled to be exonerated from his bond posted to secure any default or contumacy on his part.

Judgment is hereby ordered to be entered accordingly.

Dated: September 9, 1948.

MICHAEL J. ROCHE,
Judge of the District Court.

(Receipt of Service.)

[Endorsed]: Filed Sept. 9, 1948. [15]

[Title of District Court and Cause.]

LIBELANT'S PROPOSED AMENDMENTS TO
FINDINGS OF FACT AND CONCLUSIONS
OF LAW PROPOSED BY INTERVENER.

The above entitled cause having come on regularly for trial on the 13th day of August, 1948, and having been continued until the 27th day of August, 1948, before the above-entitled Court sitting without a jury, Frank J. Hennessy, United States Attorney, Joseph Karesh, Assistant United States Attorney, and Robert F. Peckham, Assistant United States Attorney, appearing for the libelant, United

States of America, and Fred A. Watkins, appearing for [16] intervener, Jack Andrade, and evidence, both oral and documentary having been introduced, and the cause submitted for decision, the Court now makes its findings of fact as follows:

I.

Libelant proposes that Paragraph I of Intervener's proposed Findings of Fact be amended in the following particulars: By striking therefrom that clause on page 2, line 9, beginning with the words "that it is true," ending with the words, "one Kado Barrow," on line 10, page 2.

II.

Libelant proposes that Paragraph II of Intervener's proposed Findings of Fact be amended by striking therefrom the clause beginning on line 26 of page 2 with the words, "that Jack Andrade," and ending on line 27 of said page 2 with the word "automobile"; and by adding to the said Paragraph II of Intervener's proposed Findings of Fact the following: "That said 1947 Cadillac Sedanette was sold by the said Jack Andrade to the said Everett Brown for the purchase price of \$5356.00 and that the said Everett Brown paid to the said Jack Andrade on the 24th day of October, 1947, in cash, a down payment in the sum of \$2307.00; that the said Everett Brown furnished the said Jack Andrade certain credit references at the time of the sale of the said 1947 Cadillac; that Boyd Puccinelli and the Bank of America, Post and Fillmore Branch, San Francisco, California, were listed as credit references by the said Everett

Brown; that neither Jack Andrade nor his office manager contacted any persons listed as credit references to determine the personal background of the said Everett Brown; that Everett Brown was convicted of a felony, a narcotic violation, prior to October 24, 1947; that Boyd Puccinelli has been and is now a [17] duly licensed bail bond broker and in his capacity as a bail bond broker had furnished bail for the release of Everett Brown who had been arrested and placed in jail prior to the 24th day of October, 1947, for violation of the narcotic laws of the United States; that a petition for remission and mitigation of the forfeiture of the said 1947 Cadillac Sedanette Automobile was filed by the Pacific Finance Corporation with the United States Attorney for the Northern District of California and was transmitted on the 25th day of May, 1948, to the Attorney General; that while action upon the said petition was pending the Pacific Finance Corporation withdrew the said petition on or about June 16, 1948; that no petition for remission and mitigation of the forfeiture of the said 1947 Cadillac Sedanette Automobile has ever been filed by the said Jack Andrade.

III.

Libelant proposes that Paragraphs III, IV and V of Intervener's proposed Findings of Fact be amended by striking each and all of said findings and every part thereof, and by substituting in their place and stead the following paragraph:

"That Kado Barrow and Everett Brown lived together in the residence of Everett Brown at 1430

O'Farrell Street, San Francisco, California, and were both residing in said residence during the period from February 22, 1948, through March 23, 1948; that Kado Barrow and Everett Brown were engaged in the illegal business of peddling and selling narcotic drugs during this same period; that the said Kado Barrow was at no time illegally in possession of the said 1947 Cadillac Sedanette Automobile during this same period; that Everett Brown was arrested for violating the Narcotic Laws of the United States on March 24, 1948, and that at the [18] time of the said arrest Ruby Slater fled from the room of the said Everett Brown at 1430 O'Farrell Street, San Francisco, California; that the said Ruby Slater at said time and place had heroin in her possession; that Everett Brown was convicted for the concealment and sale of narcotic drugs, which concealment and sale took place on the 20th day of February, 1948, and is now serving fifteen years in the Federal Penitentiary at McNeil Island, Washington; that Kado Barrow pleaded guilty to the sales of narcotics, which sales took place on the 22nd day of February, 1948, and on the 26th day of February, 1948, and is now serving a ten-year sentence in the Federal Penitentiary at McNeil Island, Washington."

IV.

That Everett Brown was the registered owner of the said 1947 Cadillac Sedanette Automobile on the 22nd day of February, 1948; that the said 1947 Cadillac Sedanette Automobile was being used on the 22nd day of February, 1948, to transport, carry

and convey a certain contraband article, to-wit, 12 grains of heroin, which did not bear any tax-paid internal revenue stamps; that on the said date the said contraband articles were possessed and concealed on or upon the said 1947 Cadillac Sedanette Automobile and in or upon the person of Kado Barrow while he was in or upon said automobile; that on the said date and upon or in the said Cadillac Sedanette Automobile the said Kado Barrow sold 12 grains of heroin to a Government informer under the surveillance of Federal Narcotic Bureau Agents.

V.

That Everett Brown was the registered owner of the said 1947 Cadillac Sedanette Automobile on the 24th day of February, 1948; that the said 1947 Cadillac Sedanette Automobile was being used on the 24th day of February, 1948, to [19] transport, carry and convey a certain contraband article, to-wit, 12 grains of heroin, which did not bear any tax-paid internal revenue stamps; that on the said date the said contraband articles were possessed and concealed on or upon the said 1947 Cadillac Sedanette Automobile and in or upon the person of Kado Barrow while he was in or upon said automobile; that on the said date and upon or in the said Cadillac Sedanette Automobile the said Kado Barrow sold 12 grains of heroin to a Government informer under the surveillance of Federal Narcotic Bureau Agents.

VI.

That Everett Brown was the registered owner of the said 1947 Cadillac Sedanette Automobile on

the 26th day of February, 1948; that the said 1947 Cadillac Sedanette Automobile was being used on the 26th day of February, 1948, to transport, carry and convey a certain contraband article, to-wit, 12 grains of heroin, which did not bear any tax-paid internal revenue stamps; that on the said date the said contraband articles were passed and concealed on or upon the said 1947 Cadillac Sedanette Automobile and in or upon the person of Kado Barrow while he was in or upon said automobile; that on the said date and upon or in the said Cadillac Sedanette Automobile the said Kado Barrow sold 12 grains of heroin to a Government informer under the surveillance of Federal Narcotic Bureau Agents.

VII.

That Everett Brown was the registered owner of the said 1947 Cadillac Sedanette Automobile on the 23rd day of March, 1948; that the said 1947 Cadillac Sedanette Automobile was being used on the 23rd day of March, 1948, to transport, carry and convey a certain contraband article, to-wit, 8 grains of heroin, which did not bear any tax-paid internal [20] revenue stamps; that on the said date the said contraband articles were possessed and concealed on or upon the said 1947 Cadillac Sedanette Automobile and in or upon the person of Kado Barrow while he was in or upon said automobile; that on the said date and upon or in the said Cadillac Sedanette the said Kado Barrow sold 8 grains of heroin to a Government informer under the surveillance of Federal Narcotic Bureau Agents.

CONCLUSIONS OF LAW

As conclusions of law on the foregoing facts, the Court finds:

That the said automobile, its tools and appurtenances, are condemned and forfeited to the United States.

.....
United States District Judge.

[Endorsed]: Filed Sept. 7, 1948. [21]

[Title of District Court and Cause.]

ORDER DENYING FORFEITURE

The above-entitled cause coming on regularly to be heard on the 13th day of August, 1948, and the 27th day of August, 1948, before the above-entitled Court, and the Court having heard the evidence therein and having heretofore made its findings of fact and conclusions of law upon said findings and conclusions,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

That intervener Jack Andrade do have and recover from the United States of America that certain 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances.

II.

That the District Supervisor of the Bureau of Narcotics, United States Treasury Department, be

and he is hereby directed forthwith to turn said 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, to said Jack Andrade.

III.

That said Jack Andrade be and he is hereby exonerated of bond of Two Hundred Dollars (\$200) heretofore posted by said Jack Andrade to secure any delay or contumacy on his part in the above-entitled action.

Dated: Sept. 9th, 1948.

MICHAEL J. ROCHE,

Judge of the District Court.

(Receipt of copy.)

Filed and Entered Sept. 9, 1948.

Entered in vol. 39 judg. and decrees at page 328.

[Endorsed]: [22]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To United States of America, Libellant, and Frank J. Hennessy, United States Attorney, Attorney for Libellant:

You are hereby notified that on September 9, 1948, a judgment and order was entered on behalf of Jack Andrade, Intervener in the above-entitled matter, denying forfeiture.

Dated: September 10, 1948.

FRED A. WATKINS,

Proctor for Intervener.

(Affidavit of service by mail.)

[Endorsed]: Filed Sept. 11, 1948. [23]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the libelant United States of America, appearing by Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered by the United States District Court for the Northern District of California against said libelant United States of America on September 9, 1948.

Dated: This 10th day of September, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

By /s/ JOSEPH KARESH,
Assistant United States
Attorney,

/s/ ROBERT F. PECKHAM,
Assistant United States
Attorney,
Attorneys for Libelant,
United States of America

[Endorsed]: Filed Sept. 10, 1948. [24]

[Title of District Court and Cause.]

LIBELANT'S PETITION FOR APPEAL

Libelant, being aggrieved by the rulings, findings, and judgment, and decree, made and entered therein by the above-entitled United States District Court on September 9, 1948, claims an appeal from said rulings, findings, judgment and decree to the United States Court of Appeals for the Ninth Circuit, and prays that its said appeal may be allowed.

The points and grounds of appeal are the following:

1. The Court erred in rendering judgment against libelant United States of America in that there is not any evidence to justify the findings or judgment, and the order, decision and judgment are not supported by the evidence, and are contrary to law. [25]

2. The Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record to support a finding by the Court that the respondent, One 1947 Cadillac Sedanette Automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, was in the illegal possession of Kado Barrow.

3. The Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record to support a finding by the Court that Everett Brown did not at any time expressly or impliedly authorize Kado Barrow to have possession of said 1947 Cadillac

Sedanette Automobile, and that Kado Barrow was in illegal possession of said 1947 Cadillac Sedanette Automobile on March 24, 1948, or at any other time.

Dated: December 7, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States
Attorney,

/s/ ROBERT F. PECKHAM,
Assistant United States
Attorney,
Attorneys for Libelant
United States of America.

[Endorsed]: Filed Dec. 7, 1948. [26]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

Done in open Court this 7th day of December,
1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Dec. 7, 1948. [27]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Libelant, United States of America, hereby assigns as error in the proceedings, orders, decision and judgment of the District Court in the above-entitled action, the following:

1. That the District Court erred in making and entering the findings of fact, conclusions of law, and order for judgment in favor of intervenor and against the libelant United States of America, made and entered in the above cause.

2. That the District Court erred in failing and refusing to find that the libelant United States of America was entitled to the forfeiture of the above-described respondent One 1947 Cadillac Sedanette Automobile. [28]

3. That the District Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record to support a finding by the Court that the respondent, One 1947 Cadillac Sedanette Automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, was in the illegal possession of Kado Barrow.

4. That the District Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record to support a finding by the Court that Everett Brown did not at any time, expressly or impliedly, authorize Kado Barrow to have possession of said 1947 Cadillac Sedanette Automobile, and that Kado

Barrow was in illegal possession of said 1947 Cadillac Sedanette Automobile on March 24, 1948, or at any other time.

Dated: December 7, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States
Attorney,

/s/ ROBERT F. PECKHAM,
Assistant United States
Attorney,
Attorneys for Libellant
United States of America.

[Endorsed]: Filed Dec. 7, 1948.

[Title of District Court and Cause.]

CITATION ON APPEAL

To Jack Andrade, the intervener herein, and to
Fred A. Watkins, his proctor:

Whereas, the United States of America, libellant above, has lately appealed to the United States Court of Appeals for the Ninth Circuit from the entry of a decree denying forfeiture of the above-described respondent as prayed for in libellant's libel of information, which said decree was entered on September 9, 1948, in the District Court of the United States for the Northern District of California;

You are, therefore, hereby cited to appear before the said United States Court of Appeals for the Ninth Circuit, to be held [30] in the City and County of San Francisco, State of California, at the next term of said Court thirty days after the date of this citation, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City and County of San Francisco, State of California, in the Ninth Circuit, on the 7th day of December, 1948.

MICHAEL J. ROCHE,
United States District Judge.

(Admission of service.)

[Endorsed]: Filed Dec. 8, 1948. [31]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the libelant-appellant herein may have to and including the 8th day of December, 1948, to file the record on appeal herein in the United States Court of Appeals in and for the Ninth Circuit.

Dated: October 15, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Oct. 15, 1948. [32]

[Title of District Court and Cause.]

LIBELANT'S DESIGNATION OF APOSTLES
ON APPEAL AND PRAECIPE THEREFOR

To Fred A. Watkins, Esq., 111 Sutter Street, San
Francisco 4, California, proctor for intervener
Jack Andrade; and

To C. W. Calbreath, Clerk of the United States
District Court for the Northern District of Cali-
fornia:

Libelant hereby designates and requests that the
record on appeal in the above-entitled action shall
include:

1. The Libel.
2. Motion to Intervene as Defendant.
3. Order Granting Leave to File Answer in In-
tervention.
4. Answer.
5. Reporter's entire Transcript of Testimony as
taken Friday, August 13, 1948, and Friday, August
27, 1948. [33]
6. The findings of fact and conclusions of law
as submitted by intervener, and signed and filed by
the Court.
7. Libelant's proposed amendments to the find-
ings of fact and conclusions of law of intervener.
8. Order denying forfeiture.
9. Notice of entry of judgment.
10. Notice of appeal.
11. Order extending time to docket.

12. Petition for an order allowing appeal.
13. Assignments of error.
14. Citation on appeal.
15. Praecipe for apostles on appeal.
16. Order allowing appeal.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States
Attorney,

/s/ ROBERT F. PECKHAM,
Assistant United States
Attorney,
Attorneys for Libelant
United States of America.

[Endorsed]: Filed Dec. 7, 1948. [34]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 34 pages, numbered from 1 to 34, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of *United States of America vs. One 1947 Cadillac Sedanette Automobile, etc., No. 25173-R*, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Ten Dollars and Forty Cents (\$10.40) and that the said amount has not been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of December, A.D. 1948.

(Seal)

C. W. CALBREATH,
Clerk. [35]

[Title of District Court and Cause.]

CITATION ON APPEAL

To Jack Andrade, the intervener herein, and to Fred A. Watkins, his proctor:

Whereas, the United States of America, libellant above, has lately appealed to the United States Court of Appeals for the Ninth Circuit from the entry of a decree denying forfeiture of the above-described respondent as prayed for in libellant's libel of information, which said decree was entered on September 9, 1948, in the District Court of the United States for the Northern District of California;

You are, therefore, hereby cited to appear before the said United States Court of Appeals for the Ninth Circuit, to be held [36] in the City and County of San Francisco, State of California, at the next term of said Court thirty days after the

date of this citation, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City and County of San Francisco, State of California, in the Ninth Circuit, on the 7th day of December, 1948.

/s/ MICHAEL J. ROCHE,

United States District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 8, 1948. [37]

In the Southern Division of the United States
District Court for the Northern District of
California

Before: Hon. Michael J. Roche, Judge.

No. 25173-R

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE 1947 CADILLAC SEDANETTE AUTOMO-
BILE, Motor No. 8431298, Serial No. 8431298,
its tools and appurtenances,

Respondent,

JACK ANDRADE,

Intervener.

Friday, August 13, 1948

Appearances: For the United States: Joseph Karesh, Esq., and Robert F. Peckham, Esq., Assistant United States Attorneys. For the Intervener: Fred A. Watkins, Esq.

The Court: Proceed.

Mr. Peckham: May it please the Court, this is an action brought by the United States as a result of the seizure of a 1947 Cadillac sedanette. The registered owner of the sedanette, the government will show, has been convicted of narcotics violation in Judge Goodman's Court and is now serving a term. [1*]

The Government will show that this action is brought, Your Honor, under Title 49, Section 781 and 782 of the United States Code. The Government will show that on the 24th of March the agents seized this automobile and under Section 781 which reads in the alternative, the Government will show that the car was being used to facilitate the transportation and concealing and possession and sale for the contraband articles, the narcotics.

The car is now in the custody of the District Supervisor of the Bureau of Narcotics. I think possibly counsel for the intervener and the Government can stipulate to the narcotics without calling the chemist.

Mr. Watkins: We will stipulate that the chemist would testify that whatever was involved was narcotics.

Mr. Karesh: Here they are. I think they should be identified.

Mr. Watkins: We have no reason to believe otherwise.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Mr. Peckham: Could we then mark for identification this as Government's Exhibit 1 for identification?

Mr. Watkins: So stipulated.

Mr. Peckham: We will ask that they be received for identification. I would like to ask they be marked separately because they relate to separate counts. I would like to mark them separately.

The Court: Separate what? [2]

Mr. Peckham: Separate sales of narcotics.

The Court: We are not concerned with the sales, are we?

Mr. Peckham: Yes, Your Honor. The basis of the condemnation of the car is that narcotics were sold in the car.

The Court: All right.

Mr. Peckham: What is now marked Exhibit 3 dated February 22, 1948.

The Court: One for identification.

(The envelope referred to was marked United States Exhibit No. 1 for identification.)

Mr. Peckham: The exhibit which was written on the envelope "Exhibit 4, 2/24/48," may that be marked next in line for identification?

(Envelope referred to was marked United States Exhibit No. 2 for identification.)

Mr. Peckham: The envelope that has "Exhibit 5" on it and dated "February 26, 1948," we will ask that be marked as Exhibit next in order for identification.

(Envelope referred to was marked United States Exhibit No. 3 for identification.)

Mr. Peckham: The envelope that has "Exhibit 8" marked on it and dated "March 23, 1948," be marked next in order for identification.

(Envelope referred to was marked United States Exhibit No. 4 for identification.) [3]

Mr. Peckham: For the record, Your Honor, United States Exhibit 1 for identification contains six capsules of heroin, two grains each. United States Exhibit 2 for identification contains six capsules or 12 grains of heroin. United States Exhibit 3 for identification contains six gelatin capsules which contain two grains of heroin each, a total of 12 grains wrapped in tinfoil and sealed with scotch tape. U. S. Exhibit 4 for identification contains four gelatin capsules containing eight grains of heroin wrapped in cellophane and tinfoil; no marks or label. The record will show that these exhibits for identification were received by the United States chemist for analysis from agents of the Bureau of Narcotics of the United States of America, the names being T. E. McGuire, E. P. Bertin and G. O. Coffill.

SHELBOURNE HOLMES

called for the United States; sworn.

Q. (By the Clerk): Will you state your name to the Court? A. Shelbourne Holmes.

Direct Examination

Q. (By Mr. Peckham): Mr. Holmes, are you an employee of the State of California?

A. Yes, sir.

Q. In what capacity are you employed?

A. In the office of Registration, Department of Motor Vehicles. [4]

Q. You have under your control the records pertaining to one Cadillac, 1947 Cadillac sedanette, license No. 99N205?

A. I do.

Q. Do you have those records with you?

A. I do.

Q. Who is the owner of the automobile, according to the records that you have?

A. Registered owner is Everett Brown.

Q. Who is the legal owner?

A. Pacific Finance Corporation of California, 928 Van Ness Avenue, San Francisco.

Q. What description of the automobile is shown by your records, if any?

A. No. 99N205, engine No. 8431298, 1947 Cadillac 8, five-passenger coupe.

Q. Any other description?

A. No, sir. Model 62, that is the model number.

Q. The license number is 99N205?

A. Yes, sir.

Mr. Peckham: That is all. Do you have any questions?

Mr. Watkins: No, I have not.

The Witness: May I substitute the photostatic copies for that original?

The Court: No objection?

Mr. Peckham: No. [5]

At this time we would like to offer the record in evidence. Is there any objection, Mr. Watkins, to the photostatic copy?

Mr. Watkins: No.

Mr. Peckham: Well, these will be introduced and marked as Government's Exhibit for evidence, Your Honor.

The Court: They may be admitted and marked.

(The records of the Department of Motor Vehicles were marked in evidence as U.S. Exhibits 5, 6, 7 and 8.)

GOVERNMENT'S EXHIBIT No. 5

State of California
Department of Motor Vehicles
Division of Registration

I hereby certify, that the attached photograph is a correct copy of the original document on file in the Department of Motor Vehicles. (Number of photographs, if more than one, 2.)

Attest my hand and the seal of the Department of Motor Vehicles, this 12th day of August, 1948.

/s/ THOMAS MALONEY,
Registrar of Vehicles.

REGISTRATION CARD AUTOMOBILE CALIFORNIA 1947

DEPARTMENT OF
MOTOR VEHICLES

DIVISION USE ONLY

99N20

Division Use Only
201765

RF	6	RF	
LF	39	LP	
T		RE	
D			
TL	45		

Residence, County of

CODE

NAME	Everett Brown			DATE	FEB 4 1948		CODE	
ADDRESS REGISTERED OWNER	1430 O'Farrell St San Francisco Calif							
Registration No.	99N 205	Engine No.	8431298					
Make & Cyls.	Cad 8	Body Type.	5P Cpe					
Date First Sold	1947	Year Model.						
Date Issued	12-3-47	Vehicle Model.	62					
Serial No.	Same	Regis. Fee \$	T 1.00					
Previously Registered In	Ill	License Fee \$						
		CLASS	AB-47					

LEGAL OWNER OR LIEN HOLDER OF RECORD WITH DEPT.	Pacific Finance Corp of Calif 928 Van Ness Ave San Francisco 9, Calif
---	---

Total Fees 1948 \$	42	Is vehicle garaged in an incorporated city?	YES OR
		If yes, name city	S.F.

IMPORTANT

PLATES. Plates assigned to vehicle described on face hereof are nontransferable and expire midnight, December 31, 1947.

REGISTRATION CARD. This Registration Card shall be signed by the owner and shall be fully displayed in plain sight in the driver's compartment of the vehicle described on face hereof.

TRANSFER OF OWNERSHIP. Upon the sale of the vehicle described on the face hereof this Registration Card and the Ownership Certificate properly endorsed shall be delivered to the buyer. The seller shall immediately notify the Department in writing of the sale giving the date of sale, the name and address of the buyer and the make, engine, and license number of the vehicle. The buyer, within ten days, shall apply to the Department for transfer of ownership.

REMOVAL OF LEGAL OWNER. Upon completion of payments to a bank, finance company, or other legal owner, the owner shall present the Ownership Certificate and Registration Card to the Department for removal of the legal owner's name. This must be done within ten days after receipt of the Ownership Certificate.

RENEWAL OF REGISTRATION. This Registration Card is your application for renewal of registration for 1948. Annual renewal period is from January 1 to February 4, 1948, inclusive. Renewal must be applied for and fees paid by midnight, February 4; otherwise, penalties shall be assessed.

Personal checks NOT acceptable. Applications mailed for renewal MUST be accompanied by MONEY ORDER, CASHIER'S CHECK or CERTIFIED CHECK.

SIGNATURE OF REGISTERED OWNER

RECEIVED
FEB 11 1948
FEB 11 1948

[Printer's Note]: Government's Exhibit No. 6 is similar to Exhibit No. 5 reproduced on page 48 of this Record.

GOVERNMENT'S EXHIBIT No. 7

State of California
Department of Motor Vehicles
Division of Registration

I hereby certify, that the attached photograph is a correct copy of the original document on file in the Department of Motor Vehicles. (Number of photographs, if more than one, 24.)

Attest my hand and the seal of the Department of Motor Vehicles, this 12th day of August, 1948.

/s/ THOMAS MALONEY,
Registrar of Vehicles.

1	2	3	4	5	6	7	8	9	10	
TRANSFER DUE IN 30 DAYS	1. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	2. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	3. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	4. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	5. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	6. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	7. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	8. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	9. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle	10. <i>that the</i> OWNER of the vehicle is <i>not</i> the OWNER of the vehicle



DEALER'S REPORT OF SALE AND TRANSFER USED VEHICLE

D. N. 453834

Complying with the provisions of the Vehicle Code, notification is hereby given to Division of Registration, Department of Motor Vehicles, State of California, that undersigned dealer has transferred vehicle described below to:

Is vehicle garaged in an incorporated city?

Yes ☒ No ☐ If yes, name city

Name of Purchaser

Residence or

Business Address

City

Make of Vehicle

Body type

Serial No.

FIRST

MIDDLE

LAST

County

Engine No.

Model

Year

Model

Last registered in

License No.

Unladen Weight, pounds
(Commercial type vehicles only)

*Maximum Gross Weight, pounds
(Commercial type vehicles only)

Have you checked Engine and Serial Numbers shown on Ownership Certificate against those on vehicle?

Do numbers agree?

YES OR NO

Dealer's Name

Address

Dealer's No.

JACK ANDRADE

810 VAN NESS AVE. - S. F.

1947
ORIGINAL

No. CP49912

Expiration Date June 1, 1948

(Valid six months from date issued)

Issued to

Everett Brown

California address

1430 O'Farrell St., San Francisco

Make and cyls.

Cadillac

Engine No. 8431298

Serial

Body type Cpe

Issued at

S. F.

By

M. Page

Date issued

12/1/47

Fee \$

15.00

Location of vehicle when permit issued

S. F.

7.50

22.50

Signature of Permittee

DO NOT REMOVE THIS PERMIT UNTIL VEHICLE IS PROPERLY REGISTERED IN CALIFORNIA

DEPARTMENT OF MOTOR VEHICLES

Report of Deposit of Fees

Receipt No. 268006

Office _____

Holdout No. Z 315

Date 10-29-47

NAME Ereute Brown

ADDRESS 1430 C Farrell St CITY SF

MAKE Cadillac TYPE SPC ENGINE No 8431298

RF		
RP		
SF		
SP		
LF		
LP		
TP		
D		
FPR		
TL		

Important! A deposit of fees is being accepted which will be applied on the application for registration of the vehicle described above, only when the application is presented in its complete form. THIS DEPOSIT OF FEES DOES NOT CONSTITUTE AN APPLICATION FOR CALIFORNIA REGISTRATION. You are hereby informed additional documents are required (see items checked below) to complete your application.

These documents must be submitted not later than 60 days together with the document presented today either this office, or at our office at 160 S Van Ness Ave.

SF
City

Address

[Disregard all unchecked items]

- 1—Registration Card from state in which last registered/or duplicate thereof.
- 2—Title from state last registered/or duplicate thereof.
- 3—Title from state last registered properly endorsed on the reverse side for transfer to you.
- 4—Notarized bill of sale from whom vehicle was purchased showing payment in full.
- 5—Notarized bill of sale to last registered owner from whom he purchased vehicle, showing payment in full.
- 6—Original lease contract or chattel mortgage marked paid and countersigned.
- 7—Permission from lienholder to register vehicle in California properly signed by both lienholder and a subscribing witness (Form 296).
- 8—Corrected registration showing proper motor and serial numbers.
- 9—Corrected title showing proper motor and serial numbers.
- 10—Corrected notarized bill of sale containing statement "this vehicle is guaranteed to be free and clear of liens or encumbrances."
- 11—Engine verification by authorized employee, D.M.V. (Form 191A).
- 12—Last issued California registration certificate or duplicate thereof.
- 13—Last issued California ownership certificate or duplicate thereof.
- 14 #2250 Caravan due.
- 15—

If application is not completed within 60 days, the money will be transferred to the State Treasury and no ownership certificate and no registration card will be issued.

CLERK ey

APPLICANT John (Jack) Andrade
Per [Signature]

CLEARANCE NO.	STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES HOLD OUT	SUSPENSE NO. 2 3151
S. F. OFFICE WORK OF 10-29-47		
REGISTERED OWNER'S NAME Everett Brown		
ADDRESS 143 O O'Farrell Street San Francisco		
STICKER OR TAB. NUMBER	LICENSE NUMBER	99N 205
MAKE OF VEHICLE	ENGINE NUMBER	Cadillac 8 8431298
REASON FOR HOLD OUT Incomplete		AMOUNT SUSPENDED \$ 1.00
CLERK eg		ADDITIONAL FEE
FINAL DISPOSITION		SUB- TOTAL \$
DATE CLEARED	BY	AMOUNT REFUNDED
		AMOUNT DUE \$
STOCK NO. 494		REDIFORM-PATD.-PACIFIC MANIFOLDING BOOK CO., INC., EMERYVILLE, CAL.

MT-6-47 59890 1-557-577		17.00
R. R. HUBER		2833387
(TYPEWRITE OR PRINT FULL NAME, USE BLACK INK)		
Street Address 2136 LINCOLN PARK WEST		
CHICAGO	State ILLINOIS	County COOK
Name of Car CADILLAC	Style of Body 5-COUP	Year Model 1947
Factory No. NONE	Engine No. 8431298	
No. and Bore of Cyl.	Horse Power 39.2	
WRITTEN SIGNATURE of Owner R. R. Huber		
STATE OF ILLINOIS		
LICENSE PLATES bearing above number are assigned to owner named herein for motor vehicle described for year ending December 31, 1947.		1947
EDWARD J. BARRETT, Secretary of State		

DEPARTMENT OF MOTOR VEHICLES
DIVISION OF REGISTRATION

Statement of One and the Same Person

STATE OF CALIFORNIA

COUNTY OF LA

The undersigned hereby states that—

I, Geo Sterling Edwards
STERLING Edwards
and
are one and the same person.

This statement is made in support of the signatures appearing on the documents submitted for registration and/or transfer of—

Make Cadillac Cylinders 8 Engine No. 8931298

Signature of
Subscribing
Witness

[SIGNED]

Address Automobile Club of Southern California
City BEVERLY HILLS OFFICE

Notice — Transfer Owners Interest In and Possession of Motor Vehicle

STATE OF CALIFORNIA
DEPARTMENT OF MOTOR VEHICLES
DIVISION OF REGISTRATION

REGISTRAR OF VEHICLES

Sacramento, California.

This is to advise you that on Oct 24 1947
I, as registered owner of the vehicle described below, sold or transferred my interest in and possession of said vehicle to:

Name

Address

City

License No

Make

(Signed)

Address

810 VAN NESS AVE - S. F.

Section 177 of the California Vehicle Code requires the filing of this notice immediately upon sale or transfer of a vehicle previously registered in this state. Failure to do so constitutes a misdemeanor. (Section 760.)

No. CP49912

Expiration Date June 1, 1948

(Valid six months from date issued)

Issued to Everett Brown

California address 1430 O'Farrell St., San Francisco

Make and cyle Cadillac Engine No. 8431298

Serial Qps Body type Qps

Issued at S. F. By M. Page

Date issued 12/1/47 Fee \$ 15.00

Location of vehicle when permit issued S. F. 7.50
22.50

Signature of Permittee

VERIFICATION OF VEHICLE
 I HEREBY CERTIFY, That I have examined the vehicle described on face of
 this application and I find the description to be as follows:

Cadillac ENGINE No. 8431298
1947 BODY TYPE Spars cpe
 LICENSE No. 1557-577 STATE OF ILL
Gas TYPE SAFETY GLASS
 Line No. appear to have been altered or tampered with? 16
 No. stamped on Engine Block? YES
 Signature of verifier MSand Title
 I own Automobile Club of Southern California
 REMARKS

A.C. of B.O.

JUN 3 1947

BEVERLY HILLS

47 Cal Reg

CARAVAN OR
 EMERGENCY
 PERMIT NUMBER



19 APPLICATION
 FOR CALIFORNIA
 REGISTRATION OF 47

REGISTRATION

NON-RESIDENT AUTOMOBILE

Made to State of California

DEPARTMENT OF MOTOR VEHICLES, DIVISION OF REGISTRATION

Is vehicle garaged in an incorporated city? YES If so, name city LA
 Name STERLING H. Edwards
 P. O. box or street address 908 No 15th St Los Angeles
 City Los Angeles County LA
 Make and cyl. Cadillac Engine No. 8431298
 When was vehicle first registered? 1947 Body type Spars cpe
 Serial No. 62 Model, name or number 62
 In what State was vehicle first registered? ILL
 Last registered in State of ILL for 1947 Under license Number 1557-5
 Was vehicle new when purchased by you? YES Date of purchase by you May 24

Legal owner or lien holder
 Street address
 City, State

Division will assume applicant is legal owner if no legal owner's name is given

Is vehicle to be used for transportation of persons or property for hire?
 If answer is YES, give Board of Equalization number
 Was vehicle brought to California for sale or resale?
 Are you in business or gainfully employed in California?
 If so, give starting date
 Have you established residence in California?
 On what date did you become a resident of California?
 FOR MISCELLANEOUS NOTATIONS
 CR-53270

Rated for month of May
 Regis. Fee . . . 30
 Penalty . . . 2
 License Fee . . . 26
 Penalty . . . 3
 Service Fee . . . 3
 Penalty . . . 3
 . . . 3
 . . . 3
 . . . 3
 . . . 3

Date vehicle entered California May 25 1947
 SUSPENSE SLIP TOTAL FEES DUE 1947 VLP CLASS RATE CL
42- HE47 OTW

THE UNDERSIGNED BEING DULY SWORN, deposes and says that all of the statements made in this application are true and correct and that to the best of his knowledge and belief the vehicle therein described complies with the Vehicle Code of California.

STERLING H. Edwards
 Personal Signature of Applicant

Authorized Agent for
 Subscribed and sworn to before me this 3 day of June 1947
 My Commission Expires June 30 1948

Application received at DA 1414 Office June 3 1947
 State of ILL Lic. Plate No. 1557-577 Taken
 State of ILL Notified by mail June 3 1947
 (OVER)

THE SECRETARY OF STATE

I, EDWARD J. BARRETT, Secretary of State of the State of Illinois, do hereby certify that application has been made to me for a certificate of title of a motor vehicle described as follows:

[illegible]

Applicant has stated under oath that said applicant is the owner of said motor vehicle and that it is subject to the above liens and encumbrances and no others.

I do further certify that I have used reasonable diligence in ascertaining that the facts stated in said application for a certificate of title are true. Therefore, I certify that the above named applicant has been duly registered in my office as the lawful owner of the above described motor vehicle, and it appears upon the official records of my office that at the date of the issuance of this certificate said motor vehicle is subject to the liens hereinbefore enumerated.

IN WITNESS WHEREOF, I HAVE HERETO AFFIXED MY SIGNATURE AND THE

GREAT SEAL OF THE STATE OF ILLINOIS, AT SPRINGFIELD.

Edward J. Barrett
EDWARD J. BARRETT

EDWARD J. BARRETT,
Secretary of State.

(Keep this Certificate of Title in a safe place. Do not accept title showing any erasures, alterations or mutilations.)



To be filled in by seller and delivered with vehicle to the purchaser. Application for new certificate of title must be made and immediately forwarded to the Secretary of State with fee of 50¢

ASSIGNMENT OF TITLE

FOR VALUE RECEIVED I (WE) HEREBY SELL AND ASSIGN TO

GEO. STEVENS & COMPANY 908 N. DEARBORN ST. CHICAGO, ILL.
(Name of purchaser) (Address) (City) (State)

The motor vehicle described on the reverse side of this certificate and I (we) hereby warrant the title of the said motor vehicle to be free from all liens and encumbrances except as follows:

Amount of Lien \$ NONE Kind of Lien —
(If no lien use word "none") (Mortgage, Note, Conditional Sale, etc.)

In favor of — (Holder of lien) — (Address) — (City) — (State)

Subscribed and sworn to before me this 19 day of May 1947 Signature [Signature] Seller
(Notary Public) (SEAL)

My Commission Expires June 10th, 1948

To be filled in by Illinois Dealer only, and then delivered with motor vehicle to the purchaser. Application for new certificate of title must be made and immediately forwarded to the Secretary of State with fee of 50¢.

RE-ASSIGNMENT BY DEALER

FOR VALUE RECEIVED I (WE) HEREBY SELL AND ASSIGN TO

— (Name of purchaser) — (Address) — (City) — (State)

The motor vehicle described on the reverse side of this certificate and I (we) hereby warrant the title of the said motor vehicle to be free from all liens and encumbrances except as follows:

Amount of Lien \$ — Kind of Lien —
(If no lien use word "none") (Mortgage, Note, Conditional Sale, etc.)

In favor of — (Holder of lien) — (Address) — (City) — (State)

Used car dealer's license number — Signature — Dealer
JUN 3 1947

Dealer's plate number — By — Sign here as Pres., V-Pres., Sec'y., Treas. or Authorized Agent

Subscribed and sworn to before me this 19 day of — 194— (Notary Public) (SEAL)

[Printer's Note]: Government's Exhibit No. 8 is similar to Exhibit No. 7, reproduced on pages 50 to 58 of this Record.

THOMAS E. McGUIRE

called by the Government, sworn.

Q. (By the Clerk): Will you state your name?

A. Thomas E. McGuire.

Direct Examination

Q. (By Mr. Karesh): Mr. McGuire, you are an employee of the United States Government?

A. I am.

Q. In what capacity?

A. As a federal narcotics agent.

Q. That is in the Treasury Department?

A. Yes.

Q. How long have you been employed there?

A. 20 years.

Q. How long have you been assigned to the San Francisco office?

A. The past six years. [6]

Q. What are the duties of a narcotics agent of the United States?

A. The suppression and regulation of narcotics in the legal and the illegal traffic.

Q. Is heroin a narcotic? A. Yes.

Q. What does heroin come from?

A. It is a derivative of opium.

Q. In the apprehension of narcotics violators you make use of an informer? A. Yes, we do.

Q. Calling your attention to February 22, 1948, did you have under your observation a Cadillac sedanette with license No. 99N205?

(Testimony of Thomas E. McGuire.)

A. Yes, I did.

Q. Where did you first observe the Cadillac sedanette?

A. The Cadillac was parked within about 50 feet of 1430 O'Farrell Street, to the east side of 1430.

Q. 1430 O'Farrell Street, San Francisco?

A. Yes.

Q. Do you remember about what time of day it was?

A. It was close to 1:00 o'clock in the afternoon.

Q. Calling your attention to February 24, 1948, did you have under your observation this Cadillac sedanette license No. 99N205? [7] A. Yes.

Q. Where?

A. At the same location. May I ask if that is February 22?

Q. February 24.

A. Yes. On February 24 likewise I had observed the Cadillac automobile in front of 1430 O'Farrell Street or close to the vicinity of the front of 1430 O'Farrell Street.

Q. Calling your attention to February 26, 1948, did you have under your observation a Cadillac sedanette license No. 99N205? A. Yes, I did.

Q. Where did you first see it that day?

A. In the same location, in or around 1430 O'Farrell Street.

Q. Calling your attention to March 23, 1948, did you have under your observation and surveillance a Cadillac sedanette license No. 99N205?

A. Yes, I did.

(Testimony of Thomas E. McGuire.)

Q. Where did you first observe the car?

A. In the vicinity of 1430 O'Farrell Street, San Francisco.

Q. When after March 23, 1948, if you did see the Cadillac sedanette, did you observe it?

A. After March 23, I was instrumental in the seizing of the car on March 24.

Q. 1948? A. 1948.

Q. Where did you see the car? [8]

A. It was in the same—in front of 1430 O'Farrell.

Q. Do you know who lives at 1430 O'Farrell Street? A. Yes, I do.

Q. Was Everett Brown living there?

A. Everett Brown.

Q. Was Kado Barrow living at 1430 O'Farrell Street? A. Yes, he did; both of them.

Q. Prior to February 22, 1948, do you know whether or not Everett Brown was ever convicted of a violation of the Narcotics statute?

A. Yes, I do.

Q. In the District Court of the United States; is that correct? A. Correct.

Q. Do you know on how many occasions?

A. He was convicted on two counts, pleaded guilty on two counts in 1943 for the sale of narcotics.

Q. Do you know when that date was?

A. I am not sure. I have heard it testified, and I heard the defendant—I could refresh my memory. I believe it was 1943 or 1944.

(Testimony of Thomas E. McGuire.)

Q. November 22, 1943?

A. That is correct. I heard him testify to that fact and his own admission and he also told me, and I was available to in this office at the time he was convicted.

Mr. Karesh: We would like to offer at this time a [9] certified copy of the conviction of Everett Brown for the sale of marijuana in the District Court of the United States for the Northern District of California, November 22, 1943.

The Court: What for?

Mr. Karesh: The purpose is to show the owner of the car, Everett Brown, was a known peddler of narcotics, which, of course, would be permissible, we believe, in any condemnation suit of a car.

The Court: In 1943?

Mr. Karesh: Yes. In other words, Your Honor, for the owner of a car to attempt to get back the car from the Bureau of Narcotics, he would have to show that the person who had legal title had a clean record and Everett Brown did not have a clean record.

(The objection was argued by counsel.)

The Court: It will not assist us here until you have laid the foundation for the purpose of the documents. I will sustain the objection.

Mr. Karesh: Until we show there was narcotics involved in transportation in the car, we will withdraw the offer of this document at this time and will offer it later.

The Court: Very well.

(Testimony of Thomas E. McGuire.)

Q. (By Mr. Karesh): Calling your attention to February 22, 1948, did you see an informer on that day? A. Yes, I did. [10]

The Court: What day?

The Witness: February 22, 1948.

Q. (By Mr. Karesh): Did you see the informer on February 24, 1948? A. Yes.

Q. February 28, 1948? A. I did.

Q. March 23, 1948? A. Yes, I did.

Q. Where did you first see him?

A. On each occasion I met him close to my office and brought the informer to my office in the Empire Hotel Building here in the City and County of San Francisco.

Q. Did you search him to see whether he had any narcotics in his possession at that time?

A. In my office, yes.

Q. Did you search him on February 22, 1948, to see if he had any narcotics in his possession?

A. Yes.

Q. February 24?

A. Yes; on each occasion.

Q. February 28? A. Yes.

Q. March 23? A. Yes. [11]

The Court: Search whom?

A. The informer.

Q. (By Mr. Karesh): Any narcotics in his possession?

A. No narcotics were in his possession.

Q. Now, tell us what you did with the informer?

A. On each one of the specified dates——

(Testimony of Thomas E. McGuire.)

The Court: Fix the time and place and persons present.

Q. (By Mr. Karesh): Who was present when you searched the informer?

A. Narcotic Agent Bertin and Coffill and myself in my office with the informer known as Willie Smith.

The Court: What time?

A. Approximately 1:00 or 12:30. It was approximately 12:30 on February 22, 1948.

Mr. Karesh: We will relate each instance day by day, February 22, 24, 26 and March 23.

Q. With relation to February 22, 1948, tell us what happened after you searched the informer and found he had no narcotics?

A. I then dialed the telephone number Walnut 1-6659.

Q. Do you know whose number that is?

A. Yes. That is the telephone number of Everett D. Brown at 1430 O'Farrell. On an extension of my telephone at my desk the informer was heard to have a conversation with a man later learned to be Kado Barrow at the telephone, as I recall it, Walnut 1-6659 on February 22. The informer explained to the [12] man answering that telephone at the other end that it was Smitty, his name was Smitty, and asked him if he could get six pairs of socks. Kado Barrow, or the man on the phone, replied, "All right, Smitty. Where do you want to meet me?" Smitty was told by myself to answer, "Meet me at Laguna and Fulton Streets."

(Testimony of Thomas E. McGuire.)

Q. You have said six pairs of socks. In the language of the narcotic trade, what does that mean?

A. In that particular instance it meant six capsules of heroin. The voice answered over the telephone to the informer Smitty, "I will be there within about 30 minutes." After that conversation the informer hung up the telephone and with Agent Bertin and Coffill and myself, we went to the corner of Laguna and Fulton Streets.

Q. Did you give the informer any money before that?

A. Yes. The informer was supplied with \$50 in marked government money.

Q. Continue.

A. The informer was let out of the automobile at the corner of Fulton and Laguna Streets in the City and County of San Francisco.

Q. Who else got out of the car?

A. Agent Bertin and Agent Coffill. They remained closely observing the informer and I left the vicinity and drove to 1430 O'Farrell. I observed a man whom I later learned to know [13] as Kado Barrow leave 1430 O'Farrell, enter this Cadillac automobile bearing license 99N205. I followed him as he drove in a southerly direction of O'Farrell Street until he arrived at the corner of Laguna and Fulton Streets, at which point I observed the informer entering the automobile 99N205. The car was driven on a southerly direction to Grove Street and just before the corner the informer was observed to leave the Cadillac automobile. The informer was observed walking to the

(Testimony of Thomas E. McGuire.)

direction of Agents Coffill and Bertin on that particular occasion, both of them were close together. I followed the automobile 99N205 until it returned back up to 1430 O'Farrell Street.

I then returned to where Agent Bertin and Coffill were standing with the informer Willie Smith, placed the informer Smith in my automobile with the two agents and observed the narcotics which Agent Bertin had received from the informer and we returned back to my office in which the prepared statements were made at the time of the sale detailing all the particulars of that particular sale.

Q. Now, Mr. McGuire, did you search the informer when you got him down to the office to see whether or not he had the marked government money in his possession?

A. Yes; he was searched, he was searched carefully before he left and after his return to the office. He had no money nor narcotics in his possession after he had turned over the [14] narcotics to Agent Bertin.

Q. In other words, when you first saw him he had no narcotics; you gave him the marked money. When you saw him again, he did not have the marked money and Agent Coffill turned over to you the narcotics in question.

A. That is right; or either Agent Coffill or Agent Bertin. I believe it was Coffill who retained the narcotics in each one of these incidents for transmittal to the U. S. chemist.

(Testimony of Thomas E. McGuire.)

Q. And they were so transmitted?

A. Yes.

Q. Calling your attention to February 24, 1948, did you see the informer? A. Yes, I did.

Q. Just tell us what happened on the search of the informer and giving him the money.

A. On that date, at approximately 12:00 o'clock, February 24, here in San Francisco, I met the informer, brought him to my office where I searched him carefully. He was furnished \$50. I then again dialed the telephone number Walnut 1-6659 and overheard the conversation between the informer and the voice which I learned later was Kado Barrows'. At that particular date the informer asked if he could get six pairs of socks for 50 cents. The voice answering that I later identified as Kado Barrows' said, yes, he could, and within 30 minutes after the telephone call we again placed the informer in the automobile [15] with Agent Coffill and Bertin and myself.

Q. Just a minute. At the time you searched him at the Bureau of Narcotics you took away all removables and he had no narcotics?

A. No.

Q. And the only thing he had was the money, the marked money which you gave him?

A. Yes. The informer was taken to the vicinity of Laguna and Fulton Streets and placed under the observation of Agents Coffill and Bertin at a distance while I again went to the vicinity of 1430 O'Farrell Street. I observed the man who later I learned to be Kado Barrows leave the premises

(Testimony of Thomas E. McGuire.)

at 1430 O'Farrell Street in the automobile 99N205.

Q. Cadillac sedanette?

A. Cadillac sedanette. The Cadillac was followed until it reached the corner of Laguna and Fulton Streets at which time I again observed the informer entering into the Cadillac. The Cadillac proceeded to the corner of Laguna and Fulton, within an area of 50 to 75 feet of the corner, at which time the informant was observed to leave the automobile, leave the Cadillac, and the Cadillac proceeded on. I followed it and at that particular instant, without referring to my notes, it either went to the pool hall at Post and Buchanan or it went back to 1430. I believe that was the date, without referring to my notes. [16]

Q. February 24, 1948? A. Yes.

Q. Then where did you go?

A. I then returned to the vicinity of Laguna and Grove, at which point I picked up Agent Bertin and Coffill in the government car with the informer. Then Agent Coffill had in his possession the six capsules of heroin. The informer and the other agent were taken to my office at which point the informer was carefully searched and he had no marked money nor narcotics in his possession at the time of my search.

Q. Except that which he had given Agent Coffill? A. That is correct.

Q. Calling your attention to February 26, 1948, did you see the informer on that day at your office?

A. Yes, I did.

Q. Tell us what happened on that day?

(Testimony of Thomas E. McGuire.)

A. The same procedure.

Q. About what time did you see the informer?

A. Approximately 12:00 o'clock on February 26, 1948, the informer again was searched in my office by me and all removable articles were removed and he was furnished with \$50 of marked government money. On that occasion the telephone call was made to Kado Barrows and Kado Barrows made the appointment with the—

Q. You say a phone call was made. To what number was it made? [17]

A. WALnut 1-6659. That is the phone number of Mr. Everett Brown. Kado Barrows answered and the informer made request to be supplied with six pairs of socks for 50 cents. The informer made the appointment with the man Kado Barrows to meet at Laguna and Fulton.

Q. Just a minute. You were listening in on an extension to all this conversation?

A. Yes. The informer was at one desk, while I was sitting at my desk. The man Kado Barrows spoke over the phone and the informer requested to meet him in 30 minutes and he said that he would be there. On that occasion, February 26, Agents Bertin, Coffill and I left the office with the informer, proceeded to Laguna and Fulton. We gave him the marked \$50, the informer. The informer and Agents Bertin and Coffill were let out of the government automobile in the vicinity of Fulton and Laguna while I then drove to 1430 O'Farrell Street, observed the automobile at the curb.

(Testimony of Thomas E. McGuire.)

Q. You say "automobile". You mean the Cadillac sedanette license No. 99N205?

A. That is correct. I maintained the observation of the automobile and observed the man Kado Barrow with a girl known as Ruby Slater leave the premises at 1430 O'Farrell, enter the Cadillac 99N205; that car was driven by Kado Barrow to the corner of Laguna and Fulton, at which point the informer was seen to enter the automobile, was driven to the corner of Laguna [18] and Grove Street. The informer was seen to leave the automobile and walk in the direction to where Agents Bertin and Coffill were. I observed the Cadillac automobile 99N205 being driven by this Kado Barrow.

Q. Was the lady sitting in the front or back?

A. In the front seat. The three got into the car in the front seat, that is, the informer, Ruby Slater and Kado Barrow.

The Court: Was this informer you mentioned the same informer in all these cases?

A. Yes, your Honor. He has done a series of purchases, the same informer.

The Court: All right.

The Witness: The Cadillac automobile 99N205 was observed being driven by Kado Barrow and with the young lady Ruby Slater and was followed by me from the corner of Laguna and Grove Streets to a place at Montgomery and California where the lady was observed to enter the large office building there.

(Testimony of Thomas E. McGuire.)

Mr. Karesh: Q. What is the office building?

A. I couldn't swear to the building itself. It is between Montgomery and California Streets, between Montgomery and Kearny on California. It is where one of the university clubs is, one of the clubs is in there. I later learned what the purpose of this visit was, but I can not recall what it is now. It had no—

The Court: Calling on one of the professors?

The Witness: It might be. The surveillance was continued. After the girl came out she reentered the Cadillac 99N205. I observed the car being driven by Kado Barrow and it went on to Pierce or Buchanan Street near Sutter, at which point Ruby Slater went to her home, at least entered the premises and then reentered the Cadillac automobile and was driven to 1430 O'Farrell Street.

Q. Then what did you do?

A. I rejoined Agents Bertin and Coffill. They were on the corner waiting for me. It took some three quarters of an hour for my return. Together with the informer and the two agents we returned to my office where the narcotics were taken from Agent Coffill, by Agent Coffill to me for identification, and for submission to the chemist. The informer was searched. He had no marked money in his possession nor any narcotics.

Q. Except the narcotics he had given Agent Coffill?

A. That had already been given to Agent Coffill.

(Testimony of Thomas E. McGuire.)

Q. Did you issue instructions to Agents Coffill and Bertin to remain on the spot until you came back in each instance?

A. Yes. That was the purpose of my leaving them but they were to remain there until I returned.

Q. Calling your attention to March 23, 1946, did you see the informer on that day?

A. Yes, I did.

Q. Where and when and who was present? [20]

A. On March 23 at my office I met the informer, Willie Smith, the same man throughout on the entire transactions, and he was searched and furnished with the sum of \$50 of marked government money.

Q. Just a moment. You have mentioned the name of the informer. It is the general rule the informer's identity is not disclosed but we used Willie Smith in the trial before Judge Goodman of Everett Brown and his name was mentioned there.

A. Yes. The informer placed a telephone call to Walnut 1-6659, made an engagement to meet Kado Barrow at Laguna and Grove Street. The informer was searched and furnished the \$50 of marked government money. He was taken by the agents and put in my car, the government car, taken to Laguna and Grove Streets. I went to 1430 O'Farrell, observed the defendant Kado Barrow, the man known as Kado Barrow, leave 1430 O'Farrell, enter the automobile Cadillac 99N205 and drive out to Laguna and Grove Streets at

(Testimony of Thomas E. McGuire.)

which point he picked up the informer. The informer was driven to Laguna and Grove Streets and let out of the automobile and he rejoined Agents Coffill and Bertin. I continued following the automobile and I can't swear to it but I think it returned to 1430 O'Farrell on that last occasion likewise.

Q. Your testimony is that on these dates you mentioned, you mentioned you searched the informer to see he had no money or any articles in his possession, removable articles, you found [21] he had none and you gave him the marked money, then you would drive to the spot and you would leave the informer with Coffill and Bertin and when the informer came back—

The Court: What is this, an argument now?

Mr. Karesh: I think we have gone over so much testimony, may it please your Honor, I feel there is no harm done—

The Court: Do you think that is necessary?

Mr. Karesh: No, not if your Honor doesn't; I don't think so.

The Court: I don't think so.

Mr. Karesh: Q. When did you see that Cadillac sedanette again, 99N205?

A. On March 24, 1948, here in San Francisco. I went out to 1430 O'Farrell Street. The car was parked in front of the house. I arrived on this occasion to obtain the key.

The Court: What day? A. March 24.

The Court: What time of the day or night?

(Testimony of Thomas E. McGuire.)

A. Approximately 4:00 o'clock in the afternoon.

The Court: Was that in front of the defendant's home?

A. Yes. It was at the time of the arrest of all the defendants.

The Court: What was the number?

A. 99N205—oh, 1430 O'Farrell Street.

Mr. Karesh: Q. When you arrived, you saw the car?

A. Yes. The owner of the car had the key; Everett Brown was [22] arrested—

The Court: Where is Everett Brown now?

Mr. Karesh: For the sake of the record, Everett Brown was convicted before a jury before Judge Goodman on two counts of violation of narcotic laws, sale and possession and consuming of heroin, and is now serving 15 years, the maximum, in the United States penitentiary at McNeil's Island.

The Court: You say that is the minimum?

Mr. Karesh: The maximum.

Q. Mr. McGuire, you said you identified the man as Kado Barrow, that is the person driving the car. Did he tell you his name was Kado Barrow? A. Yes.

Q. When? A. When he was arrested.

Q. You say you identified the lady in the car as Ruby Slater? A. Yes.

Q. She told you her name was Ruby Slater at the time she was arrested? A. Yes.

Q. Am I correct in stating that Ruby Slater and Kado Barrow pled guilty to the violation of

(Testimony of Thomas E. McGuire.)

the Harrison Narcotic Act, indictment No. 31334-R, and Ruby Slater and Kado Barrow in case No. 31324-G, U. S. v. Barrow. Do you know the date of that?

A. They pleaded guilty a day or two before Everett Brown, or [23] after Everett Brown. I have got the date here. I can give it to you, counsel.

Q. Yes. May 3rd 1948.

A. Ruby Slater pleaded guilty May 12, was sentenced on May 12. She pled guilty before, yes. Everett Brown was sentenced on May 21, 1948.

Q. What about Kado Barrow?

A. Kado Barrow on May 3, 1948, entered a plea of guilty and was sentenced.

Q. What happened to Kado Barrow?

A. He received five years for the sale of narcotics.

Q. He got five years for that sale on February 26?

A. Well, that was the date of the indictment. March 26.

Q. What date was the one involving Ruby Slater? A. February 24—26.

Q. That was the one jointly with Ruby Slater?

A. Yes. Likewise he had one-four, I think, on February 24.

Q. Let's get it—February 22, the first count in the indictment— A. That is February 22.

Q. 31324-G, that's right, isn't it?

A. That was on Kado Barrow.

Q. Yes.

(Testimony of Thomas E. McGuire.)

A. Well, he has two. He has 31334 and 31324.

Q. He got five years on one indictment and five years on the [24] other to run consecutively?

A. Yes.

Q. Miss Slater got a year and a day?

A. Yes.

Q. And the sentences were imposed by Judge Goodman? A. Correct.

Q. For the sale of narcotics? A. Yes.

Q. U. S. Exhibit 1, 2, 3 and 4 for identification were sent over to the chemist for analysis?

A. Yes. I identified each of them as it was submitted to me from the informer, my initials were placed on each one. This particular envelope was made in my handwriting.

Q. What are you pointing to?

A. Exhibit 2 for identification. That is my handwriting.

Q. In whose handwriting is the other exhibit?

A. 1, 2 and 4 are in Agent Coffill's writing. He is the agent who prepared them for transmittal to the U. S. chemist. I was present, however, I think on one of the occasions and I initialed the evidence on each one of them.

Q. As I gather it, the narcotics are sealed in the envelopes and the seal is not broken until it goes to the chemist and thereafter they are kept in the safe at the chemist until brought into court when the seal is then removed? A. Yes. [25]

Cross Examination

Mr. Watkins: Q. Mr. McGuire, Everett Brown was not in the car on any occasion, was he?

(Testimony of Thomas E. McGuire.)

A. Well, on the occasion that he sold the narcotics he was not in the car; that is, the car was not in that vicinity. The car was being used by the other man on the date we purchased the narcotics from Everett Brown.

Q. Everett Brown did not make any sale to you from the car that you know of?

A. Well, he didn't make the sale in this 99N205, from that car.

Mr. Karesh: You mean from this particular car? A. He did not make the sale.

Mr. Watkins: In other words, Everett Brown was not in the car on any of the occasions which you have enumerated.

A. No, not on these four occasions, no.

Mr. Watkins: That is all.

Mr. Karesh: That is all.

The Court: Mr. Brown is the gentleman who got 15 years?

Mr. Karesh: Yes.

The Court: He was never at any time in this car when any of these sales took place?

Mr. Karesh: That's right.

The Court: All right. Step down. [26]

GEORGE COFFILL

called by the United States; sworn.

The Clerk: Q. Will you state your name to the Court? A. George B. Coffill.

Direct Examination

Mr. Karesh: Q. You are in the employ of the United States? A. Yes.

Q. How long have you been employed?

(Testimony of George Coffill.)

A. Twenty-five years.

Q. In what capacity have you been employed?

A. Federal Narcotic agent.

Q. That is under the Treasury Department?

A. Yes.

Q. What are your duties?

A. The enforcement of the Harrison Narcotic Act, and the Federal Marijuana Tax Act.

Q. And the Jones-Miller Act? A. Yes.

Q. The Harrison Act has to do with the sale of narcotics and the Jones-Miller the concealment?

A. Yes.

Q. Were you in 25 years' continuous service with the Bureau of Narcotics?

A. All with the exception of 3½ years, from 1942 to 1946, when I was in the military service.

Q. What unit of the military service?

A. The Air Corps.

The Court: Coffill. When they called you, I thought they were calling a corporal from the army.

Mr. Karesh: Q. You were in the Intelligence Unit of the Air Corps? A. Yes, I was.

Q. What rank did you hold when you got out of the army? A. I was a major.

The Court: I trust that didn't offend you.

The Witness: It didn't bother me, your Honor.

The Court: I thought really his name was Corporal. I believed it was.

Mr. Karesh: Q. When did you get out of the army as a major? A. January 27, 1946.

Q. You went right back into the Bureau of Narcotics? A. Yes, I did.

(Testimony of George Coffill.)

Q. How long have you been in the San Francisco office? A. Since 1936.

Q. Do you know Agent McGuire who just testified? A. Yes.

The Court: Are you his superior or is he yours? What is your rank there?

A. I believe we are both narcotic officers. [28]

The Court: Well, isn't there some classification? Who is the supervisor?

A. Mr. Cass is the acting supervisor.

The Court: Oh, I thought McGuire was. I had every reason to believe that; he was so active around the office.

Mr. Karesh: You hold the same rank, same status?

A. That's right. I am an inspector.

Q. McGuire is an inspector?

A. He is an agent.

The Court: McGuire is always active. I knew you were there but every time McGuire shows up. It is not hard to see him, for some reason or other.

Mr. Karesh: Q. Calling your attention to February 22, 1948, did you see an informer on that day? A. Yes, I did.

Q. Just tell us what happened; what happened and where you went and what occurred?

A. Well, at about 11:30 a.m. on that date, February 22, 1948, I was in Room 2104 at 100 McAllister Street with Agent McGuire, Agent Bertin and the informer. I witnessed Agent McGuire

(Testimony of George Coffill.)

search this informer in the presence of Inspector Bertin and I then saw Agent McGuire hand the informer \$50 in currency. We then, that is, Agent McGuire and Agent Bertin and the informer and myself, left the building at 100 McAllister and entered the government automobile. Agent McGuire drove the car to the [29] vicinity of Fulton and Laguna at which point the informer and Agent Bertin and myself got out of the car. The informer stood on the corner of the street by a grocery store, that is, outside, near the curb and at about 12:00 o'clock noon I saw a Cadillac car.

Q. And this time is to the best of your recollection?

A. Yes, to the best of my recollection. I saw the Cadillac car.

Q. I think you mean 99N205?

A. 99N205, proceeding south on Fulton Street and when the car reached the intersection of Fulton and Laguna, I saw the informer get in the car. The car stopped and the informer got in the car and then the car made a righthand turn on Laguna and proceeded until it very nearly reached the corner of Laguna and Grove Streets and it stopped.

Q. You had that car under your observation?

A. Yes.

Q. At all times? A. Yes.

Q. It never got out of your sight?

A. No.

(Testimony of George Coffill.)

Q. Did the informer ever get out of your sight up to that time with the exception of getting into the car? A. No.

Q. You had him under constant surveillance?

A. Yes.

Q. Proceed.

A. When the automobile stopped near the corner of Laguna and Grove Streets, I witnessed the informer get out of the car and then the car turned right on Grove and out of my sight.

Q. But not the informer?

A. Not the informer. The informer walked on Laguna back toward Agent Bertin and myself who were at the corner of Fulton and Laguna Streets and when he reached us he handed me a small package which contained six capsules of heroin. When I weighed it, it proved to weigh 12 grains of heroin.

Q. It was placed in this envelope, U. S. Exhibit 1 for identification; that's right, isn't it?

A. That is correct.

Q. Go ahead. Then what happened?

A. The informer and Agent Bertin and I waited over in the vicinity of Fulton and Laguna Streets for a few minutes when Agent McGuire returned in the government car and we all got in the automobile with the informer, Agent Bertin and myself, and we drove back to 100 McAllister Street, went up to our office in Room 2104 where I saw Agent McGuire again search the informer and the informer had no money in his possession nor narcotics at that time.

(Testimony of George Coffill.)

Q. On February 22 you say you had the informer under your complete surveillance. Did he talk to anyone with the exception [31] of those people he talked to in the automobile?

A. That is all he talked to. He talked to no one until he got in the automobile and after he got out of the automobile he talked to no one.

Q. He did not accost anyone? A. No.

Q. You say the narcotics were sent to the chemist and you have identified U. S. Exhibit 1 for identification. A. Yes.

Q. Calling your attention to February 24, 1948, you saw the informer in the office of the Bureau of Narcotics on that day? A. I did.

Q. Who was present; just tell us what happened.

A. As I recollect, the time was approximately 2:30 p.m. on February 24, and Agent McGuire and Agent Bertin and the informer and I were in Room 2104 at 100 McAllister Street and again on this occasion I witnessed Agent McGuire search this informer in the presence of Agent Bertin and I then saw Agent McGuire hand the informer \$50 in United States currency. Then Agent McGuire and Agent Bertin and the informer and I left the building at 100 McAllister Street and entered the government automobile and Agent McGuire drove us to a spot between Montpelier and Laguna on Fulton Street where the informer and Agent Bertin and I got out of the car and the informer walked to the southwest corner of Fulton and Laguna.

(Testimony of George Coffill.)

Streets and stood there outside of the [32] grocery store close to the curb. In ten or fifteen minutes, a short time, I again saw the Cadillac car 99N205.

Q. The sedanette 99N205?

A. Coming south on Fulton and when the car reached the corner of Laguna and Fulton Streets I saw the driver open the car and I saw the informer get in the car.

Q. Prior to that time, from the time the informer left your office with the other agents to go to Laguna and what street?

A. Laguna and Fulton.

Q. Did the informer accost anyone or speak to anyone?

A. He had spoken to nobody and nobody had spoken to him.

Q. Go ahead.

A. The informer in the car and the car started out and turned right on Laguna and drove a block, or close to a block, and stopped near the corner of Grove and Laguna.

Q. Did you have that car under observation at all times?

A. All the time. I saw the informer get out of the car.

Q. Then what happened?

A. I saw the car start off and turn right on Grove Street out of my sight, but the informer walked toward Laguna and Fulton Street where Agent Bertin and I were standing.

(Testimony of George Coffill.)

Q. Did he accost anyone from the time he got out of the car until he came to you and Agent Bertin? A. He did not.

Q. Go ahead. [33]

A. When he came up to us, the informer handed a small package to me which later on in the office of the Narcotics Bureau I found to contain six capsules or 12 grains of heroin.

Q. You put it in an envelope, U. S. Exhibit 2 for identification, your name is on there, isn't it, or is it Bertin's name there?

A. In this particular instance, on February 24, the envelope was executed by Agent McGuire but then Agent Bertin and I delivered it to the chemist.

Q. It contained heroin?

A. Six capsules, two grain to a capsule.

Q. That is inside U. S. Exhibit 2 for identification, that is inside the envelope? A. Yes.

Q. Calling your attention to February 26 of 1948, did you see the informer on that day?

A. Yes, I did.

Q. Where and when and who was present and what transpired?

A. February 26, 1948, I was in the Narcotic office at Room 2104, 100 McAllister Street.

Q. About what time?

A. At approximately 12:30 p.m.

Q. Go ahead.

A. At that time I saw Agent McGuire search this informer in the presence of Agent Bertin and myself. Then I saw Agent McGuire hand the

(Testimony of George Coffill.)

informer \$50 in currency and we again left the [34] office, all four of us, and got in the government automobile, and Agent McGuire again drove us to the vicinity of the corner of Laguna and Fulton Street, where the informer and Agent Bertin and I got out of the car and the informer again stood on the corner of Fulton and Laguna Streets, outside the grocery store but over close to the curb, and in a short time, a few minutes, I again saw this Cadillac car 99N205 come down Fulton Street toward the City Hall and when it reached the corner of Fulton and Laguna it stopped and the door was opened by one occupant of the car, at which time I noticed a colored man driving the car and a colored woman sitting next to him, and I saw the informer get in the car and the car then started up and turned right on Laguna and drove just a block.

Q. Did you have it under your surveillance?

A. At that time, after I saw it approach and from then on I saw the car proceed on Laguna and when it very nearly reached the corner of Laguna and Grove it stopped and immediately I saw the informer get out and then the car started up, turned right and went west on Grove out of my sight.

Q. Go ahead.

A. And the informer came towards Laguna and Fulton Street to where Agent Bertin and I were standing.

Q. Did the informer accost or speak to anyone when he came back?

(Testimony of George Coffill.)

A. He never spoke to anyone during that period he was walking [35] to the car from where we were.

Q. Then what happened?

A. When he reached us, he just handed me a small package in the presence of Agent Bertin. The three of us then — Agent Bertin and the informer and I waited there for a considerable length of time. I mean longer than on the previous occasions. It was very nearly an hour and at the end of that time Agent McGuire came back in the government car and the informer and Agent Bertin and I then got in the car and we drove back.

Q. All the time you were waiting there, nobody talked to the informer, nobody accosted him except you people?

A. Agent Bertin and I talked to him, but nobody else did. Then we drove back to [100] McAllister Street and went up to Room 2104 where I saw Agent McGuire search this informer and he had nothing on his person, that is, he had no money, he had no narcotics at that time.

Q. The narcotic was placed in the envelope, Exhibit No. 3 for identification, and sent to the chemist for his analysis?

A. Right. I weighed the capsules and placed them in this envelope and Agent McGuire and Agent Bertin had initialed it and we sealed it and then Agent Bertin and I took the package to the U. S. chemist.

Q. Calling your attention to March 23, 1948, did you again see the informer? A. Yes.

(Testimony of George Coffill.)

Q. You saw him at the office of the Bureau of Narcotics? A. Yes.

Q. To the best of your recollection, what time was it?

A. It was around 3:30 p.m., or something like that.

Q. Who was present?

A. Agent Bertin and Agent McGuire and the informer.

Q. What happened?

A. I saw Agent McGuire again search this informer and then I saw Agent McGuire hand the informer \$50 in paper money.

Q. Go ahead.

A. Then Agent McGuire and Agent Bertin and the informer and I left the building in the government car and Agent McGuire drove us to the vicinity of Laguna and Fulton Streets where the informer and Agent Bertin and myself got out of the car and I saw the informer walk across the street to the corner where the grocery store was located at Laguna and Fulton Streets.

Q. Did anybody talk to him or accost him at that time?

A. Nobody talked to him at all or approached him.

Q. Go ahead.

A. After the informer had stayed there for 15 or 20 minutes, I again saw this Cadillac car 99N205 come down Fulton Street toward the Civil Center. When it reached the corner of Laguna and Fulton,

(Testimony of George Coffill.)

it stopped on the corner and I saw the informer get in this car and the car swung right on Laguna Street and drove the short block to Laguna and Grove and stopped. [37]

Q. You had that car under your observation?

A. From that point to Laguna and Grove I did.

Q. Go ahead.

A. Then I saw the informer get out of the car and then the car swung right, going west on Grove, out of my sight and I watched the informer come back to Fulton and Laguna Street to Inspector Bertin and myself and he handed me the small package.

Q. He didn't meet anyone?

A. No. Of course, people passed him but he spoke to no one.

Q. Didn't extend his hand to anybody?

A. No, he did not and he came back and handed a small package to me which I later found to be four capsules of heroin, a total of eight grains, if I remember.

Q. The four capsules were placed in the envelope, U. S. Exhibit 4 for identification, and you again sent the envelope to the chemist for his analysis; is that right? A. Correct.

Q. You say you saw the informer enter the Cadillac car on four separate occasions, 99N205, from the time you first observed the car to the time the informer entered the car and the time the car went away out of your sight; now then, did

(Testimony of George Coffill.)

you see anyone else other than the informer enter the car on those four occasions?

A. I did not.

Q. When did you see the car next, the Cadillac 99N205? [38]

A. After March 23 I saw it the next day, March 24, 1948.

Q. Where?

A. About 50 feet or 100 feet from the car of— from the corner of Laguna and O'Farrell Street, near the entrance to 1430 O'Farrell Street.

Q. Did you see Barrow that day?

A. Yes.

Q. Where was he when you arrested him?

A. I saw Kado Barrow approximately at 1:00 o'clock in the afternoon of that day, March 24, at the corner of Laguna and Grove Street when we arrested him.

Q. You arrested him? A. On March 24.

Q. Kado Barrow? A. Yes.

Q. Who was with you when you arrested him; where was he when you arrested him?

A. Laguna and Grove Streets.

Q. Was he in an automobile?

A. Yes. He was in a Yellow taxicab that day.

Q. You asked him where he lived?

A. Yes.

Q. What is the address?

A. He said, "I live at 1430 O'Farrell Street."

Q. Can you describe the car; any distinguishing features about [39] the car?

(Testimony of George Coffill.)

A. The car was a car which was unusual; that is, I have never seen another car exactly like it in San Francisco.

Q. What do you mean?

A. Well, it was a black car and it had two doors and it had a fabric cover on the top.

The Court: What is the importance of this?

Mr. Karesh: Just to be sure the car is identified.

The Court: We aren't talking about a Yellow taxicab now.

Mr. Karesh: No, no. We are talking about the sedanette.

The Witness: It had a snap covering on the top over a steel top giving it the appearance of a convertible, which it was not, and then it had two spotlights on it, one on each side. I had never seen two spotlights only on police vehicles before, but it had two spotlights, one on each side.

The Court: What would you conclude from that?

A. Well, I concluded that the owner had a fancy taste for automobiles.

The Court: My boy has one. Proceed.

Mr. Karesh: Q. Were you present when Everett Brown gave the key to Agent McGuire?

A. Yes, in 1430 O'Farrell Street.

Q. The car that Everett Brown gave the key to Agent McGuire, is that the car you described, the sedanette?

A. Yes. Agent McGuire handed the key to me and I drove the [40] car to the Federal Garage.

(Testimony of George Coffill.)

Mr. Karesh: At this time we will ask leave to offer in evidence on behalf of the Government U. S. Exhibits 1, 2, 3 and 4 for identification, and ask they be received in evidence.

The Court: They will be admitted and marked.

Mr. Karesh: The envelopes and contents.

(U. S. Exhibits No. 1, 2, 3 and 4, previously marked for identification, were thereupon received in evidence.)

U. S. EXHIBIT No. 1

Two envelopes with following notations thereon:

Treasury Department
Bureau of Narcotics

Ex. 3

District No. 14

Case No. Cal-3663

Name: "Kato" (colored) and Everett Brown (colored).

Address: 1430 O'Farrell St., San Francisco, California.

Evidence: Six (6) capsules of Heroin—2 grs. each, total 12 grs. wrapped in yellow cellophane and 3 pieces of chewing gum tin foil.

How obtained: Purchased by Informer Smith.

Where obtained: Laguna and Grove Sts., San Francisco, Calif.

Date: February 22, 1948. Time: 12:00 noon.

Amount paid: \$50.00.

Witnesses: T. E. McGuire, Nar. Agt.; E. B. Bertin, Nar. Agt.; G. B. Coffill, Nar. Inspec.

Agent reporting case: T. E. McGuire, Nar. Agt.

(Testimony of George Coffill.)

Remarks: Third preliminary purchase.

(Markings): Weighed and sealed 2-22-48 GBC.

Witnessed: E. P. Bertin.

Sealed: 3-4-48 GEM.

6 capsules Heroin HCL. Approx. 10 grains.

Laboratory No. 165228, 2/25/48, 165233 CEH.

[Endorsed]: Filed 8-13-48, C. W. Calbreath,
Clerk.

U. S. EXHIBIT No. 2

Two envelopes with following notations thereon:

Treasury Department
Bureau of Narcotics

Exh. No. 4

District No. 14

Case No. Cal-3663

Name: Kato and Everett Brown.

Address: 1430 O'Farrell Street.

Evidence: 6 capsules Heroin (12 grains).

How obtained: Purchased by Willie Smith.

Where obtained: Laguna and Grove.

Date: 2/24/48. Time: 3:00 p.m.

Amount paid: \$50.00.

Witnesses: E. P. Bertin, T. E. McGuire, R.
Brennan and S. Cohen.

Agent reporting case:

Remarks:

(Markings): Weighed and sealed 2/24/48. T. E.
McGuire.

(Testimony of George Coffill.)

Witnessed: 2/24/48. E. P. Bertin.

Sealed: 3-4-48 GEM, RTL.

6 capsules Heroin HCL. Approx. 10 grains.

Laboratory No. 165234, 2/25/48, 165239, CEH.

[Endorsed]: Filed 8-13-48. C. W. Calbreath,
Clerk.

U. S. EXHIBIT No. 3

Two envelopes with following notations thereon:

Treasury Department
Bureau of Narcotics

Ex.-5.

District No. 14

Case No. Cal-3663

Name: "Kato" and Everett Brown (colored) et
al.

Address: 1430 O'Farrell St., San Francisco,
Calif.

Evidence: Six (6) gelatine capsules each containing 2 grs. Heroin total—12 grains—wrapped in yellow cellophane and tin foil and sealed with scotch tape.

How obtained: Purchased by Informer Smith.

Where obtained: Laguna and Grove Streets, San Francisco, Calif.

Date: Feb. 26, 1948. Time: 1:00 p.m.

Amount paid: \$50.00.

Witnesses: T. E. McGuire, Narcotic Agent; E. P.

(Testimony of George Coffill.)

Bertin, Narcotic Agent; G. B. Coffill, Narcotic Agent.

Agent reporting case: T. E. McGuire, Narcotic Agent.

Remarks: Fifth preliminary purchase.

(Markings): Weighed and sealed 2-26-48, GBC.

Witnessed: 2-26-48 EPB.

Sealed: 3-4-48. GEM, RTL.

6 capsules Heroin, HCL, Approx. 10 grains.

Laboratory No. 165272, 165277, CEH.

[Endorsed]: Filed 8-13-48. C. W. Calbreath, Clerk.

U. S. EXHIBIT No. 4

Two envelopes with following notations thereon:

Treasury Department

Bureau of Narcotics

District No. 14

Case No. Cal-3663

Name: Everett Brown, et al. "Kato".

Address: 1430 O'Farrell St., San Francisco, Calif.

Evidence: Four (4) gelatin capsules containing 8 grains of Heroin, wrapped in cellophane chewing gum tin-foil—no marks or labels.

How obtained: Purchased by Informer Smith.

Where obtained: Laguna and Grove Streets, San Francisco, Calif.

Date: March 23, 1948. Time: 4:00 p.m.

Amount paid: \$50.00.

Witnesses: T. E. McGuire, Narcotic Agent; E. P. Bertin, Narcotic Agent; G. B. Coffill, Narcotic Agent.

(Testimony of George Coffill.)

Agent reporting case: T. C. McGuire, Narcotic Agent.

Remarks: Eighth preliminary purchase.

(Markings): Weighed and sealed, 3/23/48. GBC.

Witnessed: E. P. Bertin.

Sealed: 3-29-48. GEM, RFL.

4 capsules Heroin, HCL. Approximately 6 grains.

Laboratory No. 165928, 165931. 3/25/48.

[Endorsed]: Filed 8-13-48. C. W. Calbreath, Clerk.

Mr. Karesh: That is all.

Cross-Examination

Mr. Watkins: Q. You did not see Everett Brown in the Cadillac on any of these occasions you testified to?

A. Not on any of these occasions.

Q. You stated Kado Barrow—you arrested him, you say, when he was in a Yellow taxicab?

A. Yes.

Q. Did he have narcotics on his person at that time?

A. He had narcotics on his person. He had narcotics on his premises—

Q. Was that the same day that the informer had made a purchase?

A. That was March 24. That was not the day--- the day later that the Cadillac was used. This was March 24.

Q. When you arrested Kado Barrow he was not in the Cadillac?

A. No; he was in a Yellow taxicab.

Mr. Watkins: That is all. [41]

(Testimony of George Coffill.)

The Court: We will take a recess for a few minutes.

(Recess.)

Mr. Karesh: Q. I have one question of Mr. Coffill. Mr. Coffill, have you ever seen Everett Brown riding in this Cadillac sedanette 99N205 license number? A. Yes, I have.

Mr. Karesh: That is all.

Mr. Karesh: May I recall Mr. McGuire for one question?

THOMAS E. McGUIRE

recalled, previously sworn.

Mr. Karesh: Q. Mr. McGuire, at the time you made the arrest of the defendants you have mentioned at 1430 O'Farrell Street on March 24, 1946, did you find any narcotics in the premises 1430 O'Farrell Street? A. Yes, I did.

Mr. Karesh: That is all.

Mr. Watkins: No questions.

Mr. Peckham: Your Honor, I think counsel for the intervening party and counsel for the Government can expedite matters by stipulating at this time to certain documents.

Mr. Watkins: I offer in evidence, your Honor, an abstract of Motor Vehicle Registration, Transfer of Ownership interest from Jack Andrade to Everett Brown. [42]

The Court: What is the date?

Mr. Watkins: That is dated October 24, 1947, a conditional sales contract between Everett Brown and Jack Andrade, the claimant, dated October 24, 1947, referring to your Honor's attention to the

assignment and repurchase agreement on the reverse side of the conditional sales contract whereby the contract was assigned to the Pacific Finance Corporation, a corporation, named as the legal owner in the record offered by the Government. It may be stipulated the pink slip has been returned to Jack Andrade under the guarantee of payment agreement whereby he had to repay the finance company till the finance company had repossessed and wanted the entire balance due and made a demand on Andrade to repurchase, which he did, and paid to the finance company \$3,123.10 on May 25, 1948; the check for this amount bearing the endorsement of the finance company is being offered in evidence likewise.

I also offer in evidence, if your Honor please, a purchaser's credit statement obtained by Jack Andrade, the claimant, on October 24, 1947 when Everett Brown purchased the car. I wish to draw your Honor's attention to the fact that his occupation is given as foreman, CIO Waterfront Union, Local 110; that his monthly income is \$420; that he has other income of \$150 a month from room rent.

I offer also a letter dated May 25, 1946, from the Pacific Finance Corporation, acknowledging receipt and reassignment [43] of the contract and all interest in the automobile to Jack Andrade. I offer these as an exhibit for the claimant, your Honor.

The Court: Let them be admitted and marked.

(The documents referred to were marked Defendant's Exhibit A in evidence.)

RESPONDENT'S EXHIBIT A

Notice—Transfer Owners Interest In and
Possession of Motor Vehicle
State of California
Department of Motor Vehicles
Division of Registration

Registrar of Vehicles
Sacramento, California.

This is to advise you that on Oct. 24, 1947, I, as registered owner of the vehicle described below, sold or transferred my interest in and possession of said vehicle to:

Name: Everett Brown.

Address: 1430 O'Farrell St.

City: San Francisco.

License No.: 47 99N205. Engine No.: 8431298.

Make: '47 Cadillac. Type: Sedanet.

(Signed) JACK ANDRADE.

Address: 810 Van Ness Avenue., San Francisco.

Section 177 of the California Vehicle Code requires the filing of this notice immediately upon sale or transfer of a vehicle previously registered in this state. Failure to do so constitutes a misdemeanor. (Section 760.)

Respondent's Exhibit A (Continued)

"SMILING JACK" ANDRADE

No. 7048

King of Fine Cars

810 Van Ness, San Francisco 9, Calif.

San Francisco, California, May 25, 1948

Pay to the Order of

PACIFIC FINANCE CORP. OF CALIF.....\$3123.10

[Stamp]: Jack Andrade 3123 Dols 10 Cts.....Dollars

JACK ANDRADE

/s/ SYLVIA ANDRADE

Polk-California Office 11-136

AMERICAN TRUST COMPANY

San Francisco, California

[Endorsement on back of check]: Pay off in full—Everett Brown—
Contract 47 Cad M No. 8431298

CONTRACT OF CONDITIONAL SALE

[Printer's Note]: This Contract of Condition Sale is similar to Contract of Sale set out in full at page 13 of this printed Record.

PURCHASER'S CREDIT STATEMENT

For the purpose of securing credit from you on my purchase, I make the following representations: (Please answer all questions.)

1. Name: Everett Brown. Age 27. Married. Dependents: three. Color: Colored. Home Address: 1430 O'Farrell St., San Francisco. Phone WA. 1-4802. How long: three years. Previous Address: 1954 Bush St. How long: four years. Own home.

2. Occupation: Foreman. Employed by C.I.O. Waterfront Union, Local 110. How long? 4 yrs. Business address; 77 Clay St. Monthly income:

Respondent's Exhibit A (Continued)

\$420.00. Other income: \$150.00. From room rent. Wife's name is Geraldine.

3. References: Bank of America. Address Post and Fillmore. Loan. Trade: Exhibit Furniture Co. Address: Mission Street, San Francisco. Personal (not relatives): Boyd Puccinelli. Address 714 Kearny Street, San Francisco. Personal (not relatives): Sam Palos. Address: Auto Construction Co., Steiner and Ellis. My nearest relative other than husband, wife or child: Nolan Brown, brother. Address 1430 O'Farrell. Previous car purchased from Van Etta Motors. Financed through: Anglo-California. Fully paid: Yes.

Purchaser: Everett Brown.

Dated: Oct. 24, 1947.

PACIFIC FINANCE CORPORATION

928 Van Ness Avenue

San Francisco 9, California

TUxedo 5-4554

For Value Received we hereby sell and assign, without recourse, unto Jack Andrade the within contract signed by Everett Brown, as purchaser, covering 1947 Cadillac Sedanet, Motor Number 8431298.

PACIFIC FINANCE CORP.
OF CALIFORNIA,

By /s/ (Illegible.)

Dated at San Francisco, California, this 25th day of May, 1948.

Respondent's Exhibit A (Continued)

Subscribed and Sworn to before me, this 25th day of May, 1948.

/s/ (Illegible),

Notary Public in and for the City and County of San Francisco, State of California. My Commission expires Sept. 12, 1950.

Car No. 1328.

1. This Conditional Contract of Sale, entered into in duplicate this 24th day of Oct., 1947, by and between Jack Andrade, San Francisco, California, the party of the first part (hereinafter called Seller) and Everett Brown, 1430 O'Farrell Street, party of the second part (hereinafter called the Purchaser).

Witnesseth: Seller hereby agrees to sell, and Purchaser hereby agrees to buy the following described personal property, to-wit:

One: 1947; trade name: Cadillac; type of body, if truck, state tonnage; sedanet; motor number 8431298; serial number: same; state license number: 99N205; new or used: used; number of cylinders: eight. Complete with all standard attachments and equipment, for which Purchaser agrees to pay, at San Francisco, Calif., in the following manner: \$2,307 upon the signing of this agreement, receipt of which is hereby acknowledged, and (24) equal successive installments of \$165.32 each, payable on the same day of each month, commencing Dec. 4, 1947.

Respondent's Exhibit A (Continued)

Deposit	\$ 20.00
On Delivery	2,287.00

Total	\$2,307.00
S P	\$5,200.00
Tax	156.00
D. M. V.	1.00

Total	\$5,357.00.
Down	\$2,307.00
Net	\$3,050.00

* * * *

/s/ EVERETT BROWN.

Date delivered: 10/24/47.

Transferred R.S. No. 453834.

Pink? White P.F., 10/27/47.

Mr. Peckham: Your Honor, among the documents just offered in evidence in behalf of the claimant is a purchaser's statement, credit statement, which was filled out by the claimant and the answers of Everett Brown were filled in. References are the Bank of America, Post and Fillmore Branch. The personal references, not relatives, that was given as Boyd Puccinelli, 714 Kearny Street, San Francisco. The manager of the Bank of America and Mr. Puccinelli are in court and I believe that counsel for the claimant and myself can stipulate that if these gentlemen were called that they would testify that they were never contacted by either the Pacific Finance Company or the used car dealer, the claimant, regarding the subject, Everett Brown.

The Court: Who made it out?

Mr. Peckham: Everett Brown signed it and it was made out by Mr. Andrade with Everett Brown.

Mr. Watkins: It was so stipulated. In other words, they were given as credit references. In view of the down payment there, they never consulted them because he made a very substantial [44] down payment.

The Court: How much was the down payment involved?

Mr. Watkins: \$2,300.

The Court: How much is the Cadillac worth?

Mr. Watkins: It was \$5,356 total, payable \$150 a month, \$186 insurance in addition.

Mr. Karesh: At this time, your Honor, we renew our offer of the conviction of Mr. Brown on prior narcotic convictions on the 22nd day of November, 1943. This becomes material. The seller of the car would have to show his good faith by checking on Everett Brown. If he checked, he never would have sold the car.

Mr. Watkins: That is objected to as incompetent, irrelevant and immaterial, because this car was not shown in any instance to have been used by Everett Brown in the disposition of any narcotics.

Mr. Peckham: Well, we don't have—

Mr. Watkins: We have nobody in that car but another man whom they refer to as, I think, Kado.

Mr. Peckham: Kado Barrow.

Mr. Watkins: Everett Brown, according to the testimony of the witnesses, was never in this car when any sale of narcotics was made.

Mr. Peckham: The statute provides, your Honor, it is the car that is on trial if narcotics are sold in the car. That is [45] all we have to show. Now, then, of course, the other side would have to show the person who loaned his car, say, Brown loaned it to Barrow who was a man of good character, good reputation, and that is why the car got in trouble here, because they sold it to a man like Brown. Therefore, this becomes extremely material.

The Court: The objection will have to be sustained. The proper foundation has not been laid.

Mr. Peckham: I think counsel will stipulate that Everett Brown was convicted of this—

The Court: What is it?

Mr. Peckham: A certified copy from the United States District Court for the Northern District of California showing that Everett Brown—

The Court: 1943?

Mr. Peckham: 1943. This becomes material, your Honor, because the used car dealer could have checked to see who Everett Brown was, and had he checked, he would have seen that Everett Brown had been convicted of a narcotic violation in 1943, and when he sold him this car in 1947, he should have been placed on notice that Brown was trafficking in narcotics.

The Court: Where is the law to give us any guidance in relation to checking?

Mr. Karesh: Mr. Peckham has studied the law of condemnation and I think he would like to argue the proposition. [46]

The Court: We are talking about the admissibility of this document.

Mr. Karesh: A criminal record of a man who owns a car and lends it to somebody is admissible if it refers to a narcotic violation.

The Court: How would I know about that?

Mr. Karesh: If Your Honor please, in order to injustify—

Mr. Peckham (interrupting): Excuse me. I wonder if counsel could have a further stipulation with regard to Mr. Puccinelli's testimony if he was called. I don't know if counsel is willing to stipulate.

(Conference between respective counsel at counsel table.)

Mr. Peckham: I think we would have to call Mr. Puccinelli.

BOYD PUCCINELII

called by the United States; sworn.

The Clerk: Will you state your name to the Court? A. Boyd Puccinelli.

Direct Examination

By Mr. Peckham:

Q. Where do you live?

A. 3040 Twenty-third Avenue, San Francisco.

Q. What is your business or occupation?

A. Bail bonds and real estate broker.

Q. Where is your place of business?

A. 714 Kearny Street. [47]

Q. Do you know anyone by the name of Everett Brown? A. Yes, I do.

(Testimony of Boyd Puccinelli.)

Q. When did you become acquainted with Mr. Everett Brown? A. When?

Q. How?

A. Bail bond service at my bail bond office.

Q. To the best of your recollection, when did you first come in contact with him in that connection?

A. The last three or four years, I imagine: I don't know exactly. The last two years.

Q. You mean the first time was approximately three or four years ago?

A. Yes; maybe a little longer.

Q. Did you ever come in contact with him again in regard to bail bond matters?

A. Yes.

Q. When was that?

A. That was on this late case that he was convicted on.

Q. Was that this year?

A. I believe so, yes.

Q. Was this first bail bond transaction prior to October 24, 1947; in other words, was it prior to the first of last year?

A. I have had a number of bail bond transactions with Everett Brown prior to 1947.

Q. Do you recall the nature of the violations upon which he [48] sought bail?

A. Well, a number of vagrancy cases and assault cases. Whether there was any prior narcotic cases, I don't know at this time. I have a record in my office. I didn't know what I was

(Testimony of Boyd Puccinelli.)

coming here for and I didn't refresh my memory.

Q. Do you recall an interview with Agent McGuire concerning Everett Brown?

A. I spoke to him a number of times.

Q. You don't recall any matters that you discussed with him at that time regarding prior narcotic violations?

A. Prior narcotic violations?

Q. Yes.

A. Well, I had known that Everett Brown was convicted on narcotics prior to the time I put up this bond, I did know that, yes.

Q. On or about October 24, 1947, or any time thereafter were you contacted by anyone from the Pacific Finance Corporation or anyone from the used car dealer known as Jack Andrade concerning Everett Brown?

A. Not to me directly that I recall.

Mr. Peckham: That is all.

Mr. Watkins: No questions.

Mr. Karesh: In view of the testimony of Mr. Puccinelli we withdraw the offer of this document, your Honor. [49]

Mr. Peckham: The Government rests, your Honor.

MRS. EDWINA DeLONG

called by the claimant; sworn.

Direct Examination

Mr. Watkins: Q. Mrs. DeLong, you reside in the City and County of San Francisco?

A. Yes, I do.

Q. You have for many years last passed?

(Testimony of Mrs. Edwina DeLong.)

A. Yes.

Q. You are general office manager in charge of credit and loans of Jack Andrade Automobile business? A. That's right.

Q. You have been for how long?

A. Three and a half years.

Q. In your capacity as manager, do you handle all the contracts relating to the sale of automobiles from the premises? A. Yes, I do.

Q. You have a usual course of inquiry that you make to determine the credit standing of a purchaser?

A. Well, if I have any reason to suspect that the customer did not tell me the truth, I generally check their credit.

Q. Well, do you remember the facts concerning the Everett Brown sale of a Cadillac automobile on October 24, 1947? A. Yes. [50]

Q. You handled that transaction?

A. Yes, I did.

Q. At that time did Everett Brown make out this purchaser's credit statement at your request?

A. I asked him the questions and wrote it down myself and he signed it.

Q. He said he was a foreman employed by C.I.O. Did you do anything to ascertain whether he was?

A. Well, I asked him for identification and he had a Waterfront Employees badge and he had his union card showing he was a member.

Q. Longshoremen's union? A. Yes.

(Testimony of Mrs. Edwina DeLong.)

Q. Did he tell you the real property was located where he was residing?

A. He told me he owned the property at 1430 O'Farrell Street and rented out rooms from which he got \$150 a month income.

Q. He made a down payment at that time of \$2,307? A. Yes.

Q. Was that regarded by you as a sufficient down payment to waive further inquiry as to his credit status?

A. As long as he was a property owner and gave a good credit statement, there wasn't any reason to doubt that it was not all right.

Q. You are acquainted with the practices of the used car [51] business and have been in that business for many years? A. Yes.

Q. Before you were with Mr. Jack Andrade, you were with DeLong Motors? A. Yes.

Q. You are now Mrs. DeLong. Does the industry, the used car industry, in the sale of automobiles, inquire into the record of a man as to criminal acts? A. Never, in my knowledge.

Mr. Karesh: That is objected to, whether they inquired into it. They should inquire, whether they do or not.

The Court: You told me you would show me the law where it is a legal obligation of doing that, to make that inquiry, didn't you?

Mr. Karesh: That is the whole basis of the Government's case.

The Court: I will allow the testimony.

The Witness: Would you mind repeating that?

(Testimony of Mrs. Edwina DeLong.)

Mr. Watkins: I will ask you, are you familiar with the practice of the used car industry with respect to investigating a man's record to ascertain whether he has ever been convicted of a criminal offense before granting him credit?

A. I never heard of anyone doing that, no. We have never done it before.

Q. You yourself talked to Mr. Everett Brown?

A. Yes.

Q. Do you remember the details?

A. Yes, I do.

Q. Was there anything at all about his manner or about his buying this Cadillac, which is an expensive car, that excited your suspicion?

A. No. It is not unusual for colored people to buy large cars. They are always in looking at them. They always want Cadillacs or Lincolns and as long as they have the down payment and the credit is all right, we don't object.

Q. You do not go into the question of whether they have a criminal record? A. No.

Q. You don't do it in the case of white patrons?

A. No.

Q. In this case he made a substantial down payment. Did you regard that as a considerable sum for a colored man to have?

A. Not in the last three or four years, no.

Q. The legal ownership statement is in the possession of you?

A. Yes. It has been released by the fiance company. We have it.

(Testimony of Mrs. Edwina DeLong.)

Q. It was endorsed back to Jack Andrade?

A. Yes.

Cross-Examination

Mr. Peckham: Q. Mrs. DeLong, it is your testimony that [53] you did not check the Bank of America, the Exhibit Furniture Company, Boyd Puccinelli, Sam Palos or Nolan Brown, all of whom were given as references?

A. Nolan Brown, who is his brother, was with him at the time. I didn't check any of the others, no.

Q. Did you check the Van Etta Motor Company from whom he purchased a car, as related on this purchaser's credit statement?

A. No, we did not.

Q. Did you check the Anglo-California Bank?

A. I checked none of them.

Mr. Peckham: That is all.

The Court: **Step down.**

Mr. Watkins: That will be all, your Honor.

Mr. Karesh: I believe, your Honor, this case should be submitted on written memoranda of points and authorities.

(After discussion by respective counsel the matter was continued until Monday, August 27, 1948.) [54]

Friday, Morning Session—August 27, 1948

JACK ANDRADE

called as a witness on behalf of the Government,
and being first duly sworn, testified as follows:

The Clerk: Q. Will you state your name?

A. Jack Andrade.

Direct Examination

Mr. Karesh: Q. What is your occupation, Mr. Andrade? A. Automobile business.

Q. Where is your office?

A. 810 Van Ness Avenue.

Q. What car is this in question? What is it?

A. A 1947 Cadillac sedanette.

Q. How much did you sell that car for?

A. \$5,300 and some odd, offhand.

Q. Who did you sell that car to?

A. It was sold to Everett Brown.

Q. When? A. I have no idea.

Q. You do not know?

A. My secretary handles the office.

Q. Do you have the papers from your secretary? A. I believe Mr. Watkins has.

Mr. Watkins: The secretary is here. [55]

Mr. Karesh: I would like to develop as much as I can from Mr. Andrade. He made a statement through counsel that he had sold the car and all he was making out of it in effect was \$200.

The Court: Ask him how much he made.

Mr. Karesh: Q. What are you making on this transaction?

A. I don't know. Sometimes I buy a Cadillac for \$5,000 and sell for \$4,600.

(Testimony of Jack Andrade.)

Q. How much did Mr. Brown pay for this car?

A. Offhand, I couldn't say. I didn't write the order.

Q. Didn't Mr. Brown make a cash payment?

A. I didn't make the deal.

Q. You do not know anything about it?

A. I know what I paid for the car.

Q. What did you pay for the car?

A. The cars are sold on the floor by my salesmen. I don't sell cars. I handle the business.

Q. What did you pay for the car?

A. I paid for the car \$5,100.

Q. When was that?

A. I don't know what date it was. It is in the books.

Mr. Karesh: I think, if your Honor please, we will call the secretary.

The Court: Step down. Call the secretary. [56]

EDWINA DeLONG

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination

Mr. Karesh: Q. What is your occupation?

A. I am secretary to Jack Andrade.

Q. And Jack Andrade runs a used car business?

A. On Van Ness Avenue.

Q. In San Francisco? A. That is right.

Q. How long have you been employed by him?

A. Three and a half years.

(Testimony of Edwina DeLong.)

Q. You are in charge of the records of the company? A. That is right.

Q. Everett Brown purchased a car from the Andrade Automobile Company when, do you know?

A. In October, 1947.

Q. Did he have to give a car in exchange?

A. No, he gave a cash down payment.

Q. How much was the cash down payment?

A. \$2,300.

Q. And how much more did he pay on the car?

A. He made about two payments.

Q. What is the sum total which Mr. Everett Brown has paid to the Andrade Company? [57]

A. He paid \$2300 to us and the balance to the finance company.

Q. Any carrying charges on that car?

A. Yes.

Q. How much?

A. I don't remember the exact amount.

Mr. Watkins: I will ask counsel to give her the records.

The Court: What do you mean by carrying charges.

The Witness: Interest.

Mr. Karesh: Q. It is more than interest, isn't it Miss?

A. He had insurance and he had interest, that is all.

Q. What was the sales price of the car?

A. \$5200.

Q. How much down payment did he make?

A. \$2,307.

(Testimony of Edwina DeLong.)

Q. When was he to pay off the balance?

A. He had 24 months to pay at \$165 a month.

Q. 24 months at \$165 a month. What was the interest and carrying charges?

A. The interest was \$739.

Q. So, in other words, he was paying \$5900, is that right.

The Court: What is there irregular about that?

Mr. Karesh: \$700.

The Court: Your carrying charge.

The Witness: That is entirely within the law. There is [58] nothing irregular about the cost charges.

The Court: Q. Is there any automobile man in town who is not doing the same thing in any classification?

A. There is lots of finance companies charging 2 per cent, twice as much.

Mr. Karesh: Q. Did I understand you to say there was a \$700 carrying charge?

A. That is right, for 24 months.

Q. How many payments has he made?

A. He made two payments.

Q. What is the total amount of payments he has made? A. Approximately \$330.

Q. So what is the total amount he has paid so far on the car? A. That would make it \$2600.

Q. Who financed the contract?

A. Pacific Finance Corporation.

Q. What do the Pacific Finance Corporation do?

The Court: Q. Who is the Pacific Finance Corporation?

(Testimony of Edwina DeLong.)

A. They are the finance company that we give all our contracts to, we sell them to, and they give us a check.

Q. Where is their place of business?

A. 928 Van Ness Avenue.

Mr. Karesh: Q. So Mr. Brown has paid \$2400 on that car? A. Twenty-six.

Q. \$2600. You bought the contract back from the finance company [59] A. That is right.

Q. How much did you pay them for that contract? A. \$3,123.

Q. \$31— A. \$3,123.10.

Q. And you are getting the car back?

A. We haven't got it yet.

The Court: They hope to get the car back. Unless I change my mind, they will.

Mr. Karesh: Q. How did you happen to buy back the contract from the finance company?

A. The finance company forced us to. The dealer has to guarantee his paper.

Q. That is why that \$700 carrying and cost charge comes in, because you guarantee the paper?

A. Not necessarily. There is lots of people who charge them and who do not give paper.

Q. Isn't it true that you bought the contract back because the Pacific Finance Company had filed a petition for remission of forfeiture with the Secretary of the Treasury and they failed to get it back, and then you bought it back, is that right?

The Court: Assuming that to be true—

The Witness: I don't even know that they filed any petition.

(Testimony of Edwina DeLong.)

Mr. Karesh: Here we have a situation— [60]

The Court: Let us get through with this witness.

Mr. Karesh: Q. When was the petition for remission of forfeiture filed for the Secretary of the Treasury?

A. I didn't even know one was filed. As soon as Everett Brown was convicted, we were told to pay off the contract. We were told nothing else.

Q. And wasn't it because you knew that they had filed a petition for remission of forfeiture and had lost it?

A. I didn't know anything about it.

Q. Do you know when the petition was filed?

A. No.

Q. Tell me when you bought back the contract.

A. The check is there. May 24, I think it was.

Q. When was that?

The Court: She said the check is there.

The Witness: I believe it is May 24.

Mr. Karesh: Can I ask counsel when the petition for remission of forfeiture was filed?

Mr. Watkins: I do not know anything about it. All I know is what Mr. Peckham told me. He said a petition had been filed but that they were not going forward on the petition. Nothing was ever done. It was withdrawn, so far as I know.

The Court: It this check here?

Mr. Watkins: I think it is in evidence, if Your Honor please. [61]

The Court: Step down. Prepare your order. Call the next case.

Mr. Karesh: Your Honor, may we at this time serve notice of appeal?

The Court: Pursue your remedy at law, whatever it may be.

[Endorsed]: Filed Dec. 8, 1948.

[61A]

[Endorsed]: No. 12119. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jack Andrade, Claimant of One 1947 Cadillac Automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 9, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12119

UNITED STATES OF AMERICA,

Appellant,

vs.

JACK ANDRADE, Claimant of ONE 1947
CADILLAC SEDANETTE AUTOMOBILE,
Motor No. 8431298, Serial No. 8431298, its tools
and appurtenances,

Appellee.

AFFIDAVIT AND ORDER EXTENDING
TIME WITHIN WHICH TO DOCKET
RECORD ON APPEAL.

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

Joseph Karesh, being first duly sworn, deposes
and says:

That he is an Assistant United States Attorney
for the Northern District of California, and one of
the attorneys assigned by Frank J. Hennessy,
United States Attorney for the Northern District
of California to prepare appellant's brief and to
orally argue this case before this honorable Court;
that heretofore, and on or about the 26th day of
November, 1948, the Attorney General directed the
United States Attorney for the Northern District
of California to prosecute the appeal on behalf of
the United States of America; that at the time such

instruction was received by the United States Attorney the affiant was away from the office and did not return until December 6, 1948; that as a result of his absence he was unable to prepare the designation of the record in this cause so that the record might be docketed in this honorable Court; that the ninety-day period from the time of the filing of the notice of appeal will expire on December 8, 1948.

Wherefore, affiant prays that an order be entered herein extending the time to docket the record on appeal, to and including the 22nd day of December, 1948.

/s/ JOSEPH KARESH,
Assistant United States
Attorney.

Subscribed and sworn to before me this 8th day of December, 1948.

(Seal) FRANK SCHMID,
Deputy Clerk, United States Court of Appeals for
the Ninth Circuit.

Ordered: Time extended to December 13, 1948.

/s/ WILLIAM DENMAN,
Judge, United States Court of Appeals for the
Ninth Circuit.

[Endorsed]: Filed December 9, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
ON IN APPEAL AND DESIGNATION OF
CONTENTS OF THE RECORD TO BE
PRINTED.

The United States of America, appellant herein, hereby designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon on appeal:

1. That the District Court erred in making and entering the findings of fact, conclusions of law, and order for judgment in favor of intervener and against the libelant United States of America, made and entered in the above cause.

2. That the District Court erred in failing and refusing to find that the libelant United States of America was entitled to the forfeiture of the above-described One 1947 Cadillac Sedanette Automobile.

3. That the District Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record to support a finding by the Court that the respondent, One 1947 Cadillac Sedanette Automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, was in the illegal possession of Kado Barrow.

4. That the District Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record to support a finding by the Court that Everett Brown

did not at any time, expressly or impliedly, authorize Kado Barrow to have possession of said 1947 Cadillac Sedanette Automobile, and that Kado Barrow was in illegal possession of said 1947 Cadillac Sedanette Automobile on March 24, 1948, or at any other time.

Respectfully submitted

/s/ FRANK J. HENNESSY,
United States Attorney,

By /s/ R. B. McMILLAN,
Assistant United States
Attorney,

/s/ JOSEPH KARESH,
Assistant United States
Attorney,

/s/ ROBERT F. PECKHAM,
Assistant United States
Attorney,
Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 20, 1948. Paul P. O'Brien, Clerk.

No. 12,119

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

JACK ANDRADE, Claimant of One 1947
Cadillac Automobile, Motor No.
8431298, Serial No. 8431298, its tools
and appurtenances,

Appellee.

APPELLANT'S OPENING BRIEF.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

ROBERT F. PECKHAM,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellant.

APR 8 - 1948

Subject Index

	Page
Jurisdictional statement	1
Statement of facts.....	2
Findings of fact and conclusions of law.....	4
Order denying forfeiture.....	8
Statement of points on appeal.....	9
The issues	10
Contentions of appellant.....	10
Argument	11
I. The record contains no evidence to support the finding that Everett Brown, the registered owner of the 1947 Cadillac sedanette automobile, did not at any time expressly or impliedly authorize Kado Barrow to have possession of said 1947 Cadillac sedanette automobile, and that Kado Barrow was in illegal possession of said 1947 Cadillac sedanette automobile.....	11
II. The judgment in favor of the claimant can not be upheld upon the finding of fact that the claimant acted in good faith and complete innocence and sold the 1947 Cadillac sedanette automobile to Everett Brown in the usual course of business.....	15
Conclusion	16

Table of Authorities Cited

Cases	Pages
General Motors Acceptance Corp. v. United States, 63 F. (2d) 209	14
United States v. One Dodge Coupe, 43 F. Supp. 60.....	14
United States v. One Ford Coupe, 272 U.S. 321, 332, 47 S. Ct, 154	16
United States v. One 1937 Hudson Terraplane Coupe, 21 F. Supp. 600	14
United States v. One 1940 Packard Coupe, 36 F. Supp. 788..	14, 16
United States v. 1941 Plymouth Tudor Sedan, 153 F. (2d) 19	16
United States v. One 1946 Plymouth Sedan, 73 F. Supp. 88..	16
Various Items v. United States, 202 U.S. 577, 581, 51 S. Ct. 282	16

Statutes

21 U.S.C., Section 174 (Jones-Miller Act).....	2
26 U.S.C., Section 2553 (Harrison Narcotic Act).....	2
26 U.S.C., Section 2557 (Harrison Narcotic Act).....	2
19 U.S.C.A., Section 1615.....	13
28 U.S.C.A., Section 1291.....	2
49 U.S.C.A., Section 781.....	2
49 U.S.C.A., Section 782.....	2, 11, 15
49 U.S.C.A., Section 784.....	2, 13

No. 12,119

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

VS.

JACK ANDRADE, Claimant of One 1947
Cadillac Automobile, Motor No.
8431298, Serial No. 8431298, its tools
and appurtenances,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying forfeiture to the United States of America, appellant herein, of One 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, and directing that the said automobile, its tools and appurtenances, be turned over to the intervener Jack Andrade, the appellee herein (Tr. 30, 31). Proceedings to forfeit said automobile, its tools and appurtenances, were brought on behalf of the

appellant herein under the provisions of Title 49 U.S.C.A., Sections 781, 782, 784 (see Appendix), and related statutes. Jurisdiction to review the order of the Court below is conferred upon this Honorable Court by Title 28 U.S.C.A., Section 1291.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below denying forfeiture to the United States of America, appellant herein, of one 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, and directing that the said automobile, its tools and appurtenances, be turned over to the intervener Jack Andrade, the appellee herein (Tr. 30, 31). The undisputed facts are that on four separate occasions one Kado Barrow illegally transported and sold narcotics in the said 1947 Cadillac Sedanette automobile. All sales were made to the informer in the said car, under the surveillance of agents of the Federal Bureau of Narcotics in San Francisco. These transactions were in violation of the Harrison Narcotic Act, Title 26 U.S.C., Sections 2553 and 2557, and the Jones-Miller Act, Title 21 U.S.C., Section 174. The aforementioned illegal activities occurred on February 22, 1948 (Tr. 65-66), February 24, 1948 (Tr. 67-68), February 26, 1948 (Tr. 70), and March 23, 1948 (Tr. 72).

On February 22, 1948 (Tr. 65-66), on February 24, 1948 (Tr. 67-68), on February 26, 1948 (Tr. 70), and on March 23, 1948 (Tr. 72), the said automobile was

parked in the immediate vicinity of 1430 O'Farrell Street, San Francisco, and on each of these occasions the said Kado Barrow was observed to leave 1430 O'Farrell Street and enter the said automobile and drive the said automobile to a prearranged place, where he met the informer and the illegal transactions hereinabove set out took place.

Arrangements for each of the illicit sales were made by the informer placing a telephone call from the office of the Bureau of Narcotics to Walnut 1-6659, which is the telephone listed to the name of Everett Brown, 1430 O'Farrell Street, San Francisco (Tr. 64, 67, 69, 72). On one of the occasions, to-wit, on February 26, 1948, one Ruby Slater was in the car with Kado Barrow (Tr. 69-71).

It is also undisputed that Everett Brown purchased the said automobile from the said appellee for the sum of \$5356.00 (Tr. 101, 102). It is also undisputed that the said Everett Brown was the registered owner of the said automobile, having purchased it from the appellee for the sum of \$5356.00 on or about the 24th day of October, 1947, making on that date a down payment in the sum of \$2307.00 (Tr. 108, 109). At the time of the arrest of Everett Brown on March 24, 1949, at 1430 O'Farrell Street, San Francisco, he was in possession of the keys to the said automobile. Ruby Slater was also arrested at the same time at the said address, 1430 O'Farrell Street, San Francisco, and at the time of her arrest was found in possession of a quantity of narcotics.

Subsequently Ruby Slater, Kado Barrow, and Everett Brown were convicted of violation of the Narcotic Statutes. Said Kado Barrow was sentenced to ten years imprisonment, and the said Ruby Slater was sentenced to imprisonment for one year and one day (Tr. 75-76), these sentences being imposed on the said Barrow and the said Slater for offenses occurring in the said automobile. The said Everett Brown was sentenced to fifteen years imprisonment for violation of the Narcotic Statutes, although these violations were not offenses occurring in the said automobile (Tr. 74). The convictions of Barrow, Slater and Brown took place at approximately the same time (Tr. 75).

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The following are the findings of fact and conclusions of law entered by the Court below:

“(Title of District Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled cause having come on regularly for trial on the 13th day of August, 1948, and having been continued until the 27th day of August, 1948, before the above-entitled Court sitting without a jury, Joseph Karesh, Esq., and Robert Peckham, Esq., appearing for the libelant, United States of America, and Fred A. Watkins, Esq., appearing for intervener, Jack Andrade, and evidence, both oral and documentary having been introduced, and the cause submitted for deci-

sion, the Court now makes its findings of fact as follows:

FINDINGS OF FACT.

I.

That it is true that on or about the 24th day of March, 1948, in the City and County of San Francisco, State of California, duly authorized agents of the Bureau of Narcotics, Treasury Department of the United States, seized a certain automobile, to-wit, one 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances; that it is true that at said time said Cadillac sedanette was in the illegal possession of one Cato Barrow; that the said automobile, its tools and appurtenances are presently in the custody of the District Supervisor of the Bureau of Narcotics, United States Treasury Department.

II.

That on or about the 24th day of October, 1947, Jack Andrade was the owner of that certain 1947 Cadillac sedanette automobile, its tools and appurtenances, and that on said date Jack Andrade did sell said car, its tools and appurtenances under a conditional sales contract to one Everett Brown; that said contract of conditional sale was assigned on said date to the Pacific Finance Corporation of California; that said Everett Brown became in default under the terms of said conditional sales contract; that intervener Jack Andrade repurchased the 1947 Cadillac sedanette from the Pacific Finance Corporation, pursuant to a guaranty of payment agreement with said

Finance Corporation, on or about the 25th day of May, 1948; that Jack Andrade is the legal owner of said Cadillac sedanette automobile.

III.

That on or about the 24th day of March, 1948, the Bureau of Narcotics agents, Treasury Department of the United States, seized that certain 1947 Cadillac sedanette automobile for an alleged violation of Title 49, Section 781, United States Code, by one Cato Barrow; that Jack Andrade is a stranger to Cato Barrow and to Everett Brown; that Jack Andrade has acted in good faith, and when Jack Andrade sold the said Cadillac sedanette automobile to Everett Brown on the 27th day of October, 1947, said Everett Brown presented sufficient credit references by way of cash paid to Jack Andrade and by way of information to Jack Andrade which indicated to Jack Andrade that said sale was one in the usual course of business of said Jack Andrade; that said Jack Andrade had no other relationship with Everett Brown than that necessary to consummate the sale of the Cadillac sedanette automobile on October 27, 1947.

IV.

That Everett Brown was not in possession of, nor ever in possession of, or in or about the said 1947 Cadillac sedanette automobile at any time when the Federal agents, Bureau of Narcotics, Treasury Department of the United States, seized said car for a violation of Title 49, Section 781, United States Code; that said Everett Brown did not at any time expressly or impliedly authorize Cato Barrow to have possession of said 1947 Cadillac sedanette automobile; that said Cato Barrow

was in illegal possession of said 1947 Cadillac sedanette automobile on March 24, 1948, at the time the Federal agents, Bureau of Narcotics, Treasury Department of the United States, seized said car, nor at any other time.

V.

That Jack Andrade has at all times acted in good faith and in complete innocence in the sale of said Cadillac sedanette automobile to Everett Brown, and did have no, and has never had any, knowledge of the use of the said 1947 Cadillac sedanette automobile for any violation of Title 49, Section 781, United States Code, nor were there any circumstances sufficient to arouse the suspicions of a reasonable and prudent person.

CONCLUSIONS OF LAW.

As conclusions of law on the foregoing facts, the Court finds:

That Intervener Jack Andrade is entitled to possession of that 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, and that said Jack Andrade is entitled to be exonerated from his bond posted to secure any default or contumacy on his part.

Judgment is hereby ordered to be entered accordingly.

Dated: September 9, 1948.

Michael J. Roche,
Judge of the District Court.

(Receipt of Service.)

(Endorsed): Filed Sept. 9, 1948."

(Tr. 22-25.)

ORDER DENYING FORFEITURE.

The following is the order of the Court below denying forfeiture:

“(Title of District Court and Cause.)

ORDER DENYING FORFEITURE.

The above-entitled cause coming on regularly to be heard on the 13th day of August, 1948, and the 27th day of August, 1948, before the above-entitled Court, and the Court having heard the evidence therein and having heretofore made its findings of fact and conclusions of law upon said findings and conclusions,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

That intervenor Jack Andrade do have and recover from the United States of America that certain 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances.

II.

That the District Supervisor of the Bureau of Narcotics, United States Treasury Department, be and he is hereby directed forthwith to turn said 1947 Cadillac sedanette automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, to said Jack Andrade.

III.

That said Jack Andrade be and he is hereby exonerated of bond of Two Hundred Dollars (\$200) heretofore posted by said Jack Andrade

to secure any delay or contumacy on his part in the above-entitled action.

Dated: Sept. 9th, 1948.

Michael J. Roche,
Judge of the District Court.

(Receipt of copy.)

Filed and Entered Sept. 9, 1948.

Entered in vol. 39 judg. and decrees at page 328.

(Endorsed):''

(Tr. 31-32.)

From this latter order appellant now appeals to this Honorable Court (Tr. 33).

STATEMENT OF POINTS ON APPEAL.

The following is the statement of points to be relied upon on appeal:

“1. That the District Court erred in making and entering the findings of fact, conclusions of law, and order for judgment in favor of intervenor and against the libelant United States of America, made and entered in the above cause.

2. That the District Court erred in failing and refusing to find that the libelant United States of America was entitled to the forfeiture of the above-described One 1947 Cadillac Sedanette Automobile.

3. That the District Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record

to support a finding by the Court that the respondent, One 1947 Cadillac Sedanette Automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances, was in the illegal possession of Kado Barrow.

4. That the District Court erred in rendering judgment against libelant United States of America, in that there is no evidence in the record to support a finding by the Court that Everett Brown did not at any time, expressly or impliedly, authorize Kado Barrow to have possession of said 1947 Cadillac Sedanette Automobile, and that Kado Barrow was in illegal possession of said 1947 Cadillac Sedanette Automobile on March 24, 1948, or at any other time."

THE ISSUES.

1. Is there any evidence to sustain the finding of the Court that the said automobile was in the illegal possession of Kado Barrow?

2. Is the good faith and the innocence of the legal owner a defense in an action for forfeiture of an automobile used in the illegal sale and transportation of narcotics?

CONTENTIONS OF APPELLANT.

The appellant in support of its contention that the judgment in favor of appellee should be reversed, contends and will argue:

1. The record contains no evidence to support the finding that Everett Brown, the registered owner of

the 1947 Cadillac sedanette automobile, did not at any time expressly or impliedly authorize Kado Barrow to have possession of said 1947 Cadillac sedanette automobile, and that Kado Barrow was in illegal possession of said 1947 Cadillac sedanette automobile.

2. The judgment in favor of the claimant can not be upheld upon the finding of fact that the claimant acted in good faith and complete innocence and sold the 1947 Cadillac sedanette automobile to Everett Brown in the usual course of business.

ARGUMENT.

I. THE RECORD CONTAINS NO EVIDENCE TO SUPPORT THE FINDING THAT EVERETT BROWN, THE REGISTERED OWNER OF THE 1947 CADILLAC SEDANETTE AUTOMOBILE, DID NOT AT ANY TIME EXPRESSLY OR IMPLIEDLY AUTHORIZE KADO BARROW TO HAVE POSSESSION OF SAID 1947 CADILLAC SEDANETTE AUTOMOBILE, AND THAT KADO BARROW WAS IN ILLEGAL POSSESSION OF SAID 1947 CADILLAC SEDANETTE AUTOMOBILE.

Only one finding of the Court below could substantiate the conclusion of law that the claimant is entitled to recover the said 1947 Cadillac sedanette automobile. That finding is that Kado Barrow was in the illegal possession of the automobile on each of the four occasions that he sold narcotics in the said Cadillac automobile to the informer. Section 782 of Title 49 of the United States Code (see appendix) provides that no vehicle shall be forfeited by reason of any act or omission established by the owner thereof to have

been committed or omitted by any person other than such owner while such vehicle was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. If the preponderance of evidence contained in the record showed that Kado Barrow was clearly in the illegal possession of the said Cadillac automobile and had obtained the possession thereof from Everett Brown in violation of the criminal law of the United States, or of the State of California, such findings as are contained in Paragraphs I and IV of the Findings of Fact and Conclusions of Law (Tr. 22-24) are proper.

A reading of the transcript, however, indicates that there is not a scintilla of evidence from which the Court below could make the finding that Kado Barrow was illegally in possession of the said Cadillac automobile on the four occasions that heroin was sold therein to the informer. On the contrary, the uncontroverted testimony of the Government witnesses is such that the only possible inference from the evidence is that Kado Barrow had the consent of Everett Brown to use the said Cadillac automobile to make the sales of the heroin. Everett Brown and Kado Barrow not only lived together at 1430 O'Farrell Street, San Francisco, California (Tr. 61), but each of the four times the informer telephoned Kado Barrow to arrange to buy narcotics Kado Barrow was telephoned at Walnut 1-6659, which was the telephone number of Everett Brown (Tr. 64, 67, 69 and 72).

On each of the four occasions Agent McGuire observed Kado Barrow leave 1430 O'Farrell Street, San Francisco, in the said Cadillac automobile and return to the same place after the sale was completed. On March 24, 1948, when the automobile was seized, Everett Brown had the keys of the said Cadillac automobile on his person (Tr. 74). It is also significant to note that Everett Brown was sentenced on May 21, 1948, to serve fifteen years in a United States Penitentiary for narcotic violations, and Kado Barrow was sentenced on May 3, 1948, to five years' imprisonment for the sale of narcotics that took place on February 22 and 26, 1948 (Tr. 74, 75, 76).

Neither did the claimant produce any evidence at the trial from which the Court could find that Kado Barrow was in the illegal possession of the said 1947 Cadillac automobile, nor did the claimant introduce any evidence to show that narcotics were never transported in the said Cadillac automobile. The testimony produced by the claimant only pertained to his good faith and complete innocence in the sale of the automobile to Everett Brown. Clearly the claimant did not satisfy the burden of proof which shifted to him upon the appellant's having shown probable cause for the institution of the action for the forfeiture of the Cadillac automobile.

Section 1615 of Title 19 U.S.C. (see appendix), as applied by Title 49 U.S.C. Section 784 (see appendix) to such suits as the one now before this Court, provides that the burden of proof shall lie upon the

claimant, provided that probable cause shall be first shown for the institution of such suit. The appellant, by the evidence set forth above, clearly established probable cause for the institution of these proceedings, and the burden of proof shifted to the claimant to show by a fair preponderance of the evidence that either narcotics were not sold in said Cadillac automobile and the vehicle was innocent, or that Kado Barrow was in illegal possession of the Cadillac automobile. *United States v. One 1937 Hudson Terraplane Coupe*, 21 F. Supp. 600; *United States v. One Dodge Coupe*, 43 F. Supp. 60; *General Motors Acceptance Corp. v. United States*, 63 F. (2d) 209.

All claimant succeeded in establishing on cross-examination was that Kado Barrow and not Everett Brown was driving, and was in possession of, the said Cadillac automobile on each of the four occasions when narcotics were sold. That alone is not a sufficient ground upon which to deny the forfeiture of the said Cadillac automobile.

In *United States v. One 1940 Packard*, 36 F. Supp. 788, the Court held that the automobile was subject to forfeiture as against claim of owner regardless whether the owner had guilty knowledge where the automobile was seized while being used by the husband of the registered owner. It must not be forgotten that a libel proceeding such as this case is a proceeding *in rem* against the automobile in which the law ascribes to the automobile a power of complicity and guilt in the offense.

To prevail, a claimant must show more than the mere fact that the registered owner was not driving the seized vehicle at the time of the transportation and sale of the contraband article. It is necessary for a claimant to establish by a fair preponderance of the evidence that the seized vehicle was stolen from the registered owner or that the latter was deprived of possession in violation of the laws of the United States, or of the State (49 U.S.C. 782). Nowhere in the record of this case can any evidence be found that Kado Barrow either stole or otherwise illegally deprived the registered owner Everett Brown of possession of the said Cadillac automobile in violation of the laws of the United States, or of the State of California. Therefore, the order denying forfeiture in this case is clearly erroneous in that no evidence was presented to justify the finding upon which the said order was made.

II. THE JUDGMENT IN FAVOR OF THE CLAIMANT CAN NOT BE UPHELD UPON THE FINDING OF FACT THAT THE CLAIMANT ACTED IN GOOD FAITH AND COMPLETE INNOCENCE AND SOLD THE 1947 CADILLAC SEDANETTE AUTOMOBILE TO EVERETT BROWN IN THE USUAL COURSE OF BUSINESS.

The appellee's evidence produced below was concerned only with his innocence and good faith. The good faith and complete innocence of appellee alone are no defense against the forfeiture. The cases are numerous for the proposition that an innocent lienor,

chattel mortgagee, or legal owner is not entitled to relief from a forfeiture of its interest by reason of its innocence. *United States v. One Ford Coupe*, 272 U.S. 321, 332, 47 S. Ct. 154; *Various Items v. United States*, 202 U.S. 577, 581, 51 S. Ct. 282; *United States v. One 1940 Packard Coupe*, 36 F. Supp. 788.

The only remedy of an innocent owner or lienor or mortgagee is through an act of grace on the part of the cabinet officer in whose jurisdiction the forfeiture lies. The District Court is without jurisdiction to release a seized automobile by way of mitigation or remission, or to remit the forfeiture to the extent of the innocent lienor's or owner's interest.

United States v. 1941 Plymouth Tudor Sedan,
153 F. (2d) 19;

United States v. One 1946 Plymouth Sedan, 73
F. Supp. 88.

A petition for remission or mitigation of the forfeiture filed with the Attorney General is the only remedy available to the lienor or owner whose only defense against the forfeiture is his innocence.

Therefore, the order denying the forfeiture in this case can not be upheld upon the finding that the appellee acted in good faith and complete innocence.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order denying forfeiture be reversed and the case remanded to the Court below with directions that

it enter judgment granting appellant the relief for which it prayed.

Dated, San Francisco, California,
April 4, 1949.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,

ROBERT F. PECKHAM,
Assistant United States Attorney,
Attorneys for Appellant.

(Appendix Follows.)



Appendix

Title 19, U.S.C.A., Section 1615:

“§ 1615. Burden of proof in forfeiture proceedings

In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be *prima facie* evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise (sic) or containers of merchandise shall be *prima facie* evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indi-

cating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel. (June 17, 1930, c. 497, Title IV, § 615, 46 Stat. 757; Aug. 5, 1935, c. 438, Title II, § 207, 49 Stat. 525.)”

Title 49, *U.S.C.A.*, Section 781:

“§ 781. Unlawful use of vessels, vehicles, and aircrafts; contraband article defined

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term ‘contraband article’ means—

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith, or which is sold or offered for sale in violation thereof, or which does not bear appropriate

tax-paid internal revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Act, as now or hereafter amended, or any regulation issued pursuant thereto; or

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security. Aug. 9, 1939, c. 618, § 1, 53 Stat. 1291.”

Title 49, *U.S.C.A.*, Section 782:

“§ 782. Seizure and forfeiture

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781, or in, upon, or by means of which any violation of section 781 has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided*

further, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. Aug. 9, 1939, c. 618, § 2, 53 Stat. 1291."

Title 49, *U.S.C.A.*, Section 784:

"§ 784. Application of related laws

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels and vehicles for violation of the customs laws; the disposition of such vessels and vehicles or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels and vehicles under the customs laws shall be performed with respect to seizures and forfeitures of vessels, vehicles and aircraft under this chapter by such officers, agents or other persons as may be authorized or designated for that purpose by the Secretary of the Treasury Aug. 9, 1939, c. 618, § 4, 53 Stat. 1292."

No. 12,119

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

JACK ANDRADE, Claimant of One 1947
Cadillac Automobile, Motor No.
8431298, Serial No. 8431298, its tools
and appurtenances,

Appellee.

BRIEF FOR APPELLEE.

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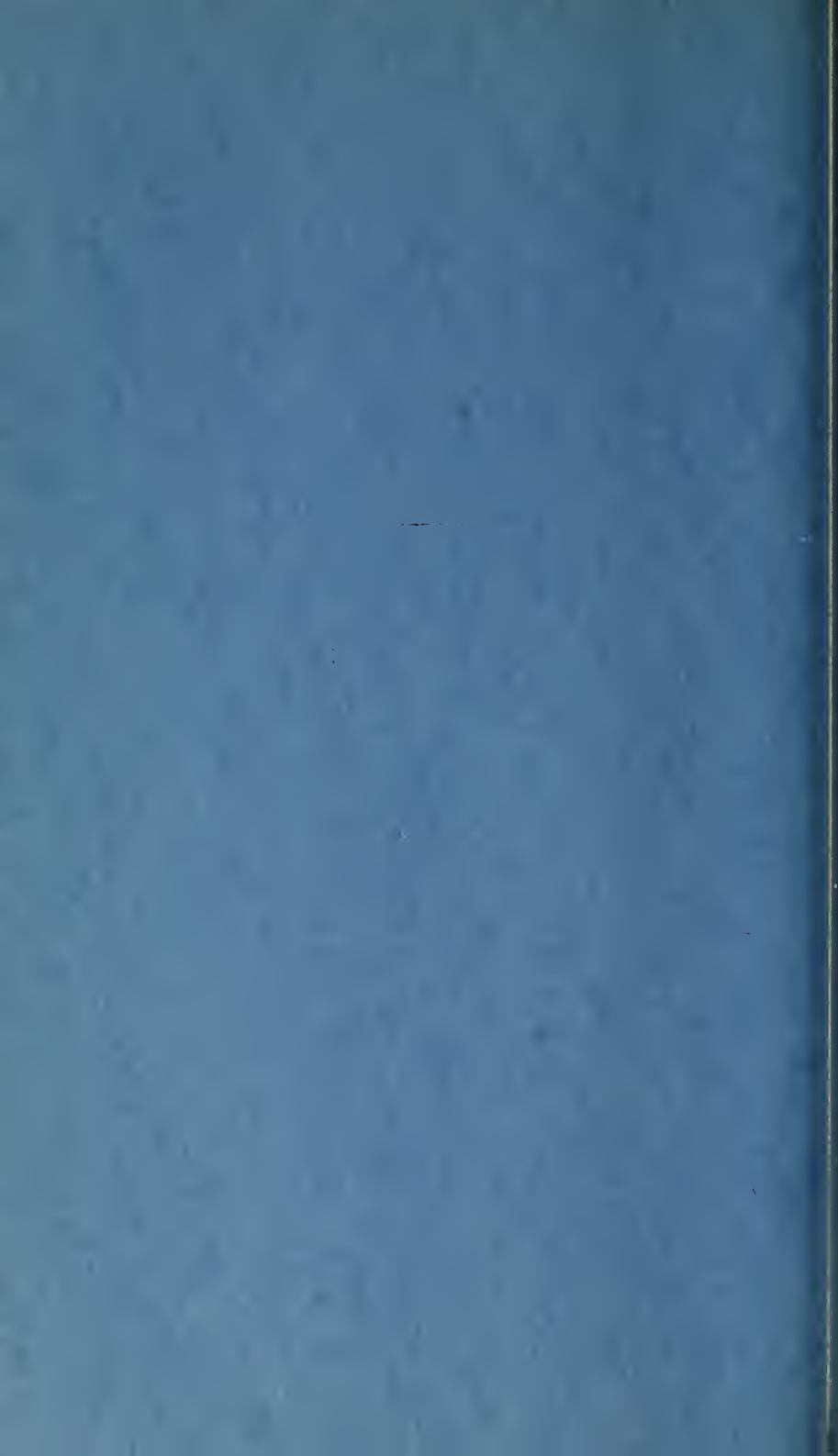
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PAUL P. O'BRIEN,

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Subject Index

	Page
Statement of facts	1
Findings	3
Argument	3
Basic purpose of forfeiture statute relates to collection of taxes	3
Trial court is sole judge of probable cause.....	3
Conclusion	14

Table of Authorities Cited

Cases	Pages
General Motors Acceptance Corp. v. U. S., 63 F. (2d) 209	7
Johnson v. American Hawaiian Steamship Co., 98 F. (2d) 847	11
Loring v. Frue, 104 U. S. 223, 26 L. ed. 713.....	11
People v. One 1937 Plymouth 6, etc., 37 C. A. (2d) 65....	9
Platt v. U. S., 163 F. (2d) 165	8
U. S. v. Chiles, 43 F. Supp. 776	4
U. S. v. Fraser, 42 F. 140	7
U. S. v. One 1938 Chevrolet, etc., 78 F. Supp. 676.....	9
U. S. v. One 1941 Chrysler Brougham Sedan, 74 F. Supp. 970	4
U. S. v. One Dodge Coupe, 43 F. Supp. 60.....	7
U. S. v. One 1937 Hudson Terraplane Coupe, 21 F. Supp. 600	7
U. S. v. One 1941 Plymouth Tudor Sedan, 153 F. (2d) 19..	13
U. S. v. 1946 Plymouth Sedan, 73 F. Supp. 88.....	13
U. S. v. One Reo Speed Wagon, 5 F. (2d) 372.....	8
U. S. v. Still, 120 F. (2d) 876	12
U. S. v. The J. Duffy, 14 F. (2d) 426	4

Statutes

U.S.C.A.:	
Title 19, Section 1615	4, 12
Title 49, Section 782	4
Title 49, Section 784	13

Rules

Federal Rules of Civil Procedure, Rule 52(a).....	12
---	----

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IN THE

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For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

JACK ANDRADE, Claimant of One 1947
Cadillac Automobile, Motor No.
8431298, Serial No. 8431298, its tools
and appurtenances,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The appellee, Jack Andrade, a used car dealer at 810 Van Ness Avenue, San Francisco, California, purchased in the course of his business a 1947 Cadillac sedanette automobile for \$5,100, and in the regular course of business sold it to one Everett Brown for \$5,300 (Tr. 112, 113). Mrs. Edwina DeLong, office manager for appellee, procured a purchaser's credit statement in writing from Brown, ascertained he was a foreman of longshoremen, a member of the C.I.O. Longshoremen's Union, and that he owned real prop-

erty at 1430 O'Farrell Street, San Francisco, California, the income from which was \$150 a month. A cash down payment of \$2,307 was made by Everett Brown and a conditional sale contract executed (Tr. 108, 109). Appellee assigned the contract to Pacific Finance Corporation, and when Everett Brown defaulted in payments, the appellee, by virtue of his guarantee of payment contract, took a re-assignment of the conditional sale contract from the finance company and reimbursed the corporation \$3,123.10 (Tr. 114, 115, 116).

The contract of conditional sale expressly provides the purchaser shall not make illegal or improper use of the automobile. Time is declared to be of the essence, and a default on the part of the purchaser as to any of the terms entitles the seller to take immediate possession of the property without demand (Tr. 15).

Testimony of the Federal Narcotics Agents established that the automobile had been used by one Kado Barrow to transport narcotics. Contact was established by an informer telephoning the residence of Everett Brown at 1430 O'Farrell Street, San Francisco, California (Tr. 64). On each occasion, Kado Barrow answered (Tr. 64, 67, 69, 72). Agent Thomas McGuire stated both Barrow and Brown lived at the same address, 1430 O'Farrell Street, but offered no evidence to prove the assertion (Tr. 61). There is no testimony in the record that Everett Brown ever answered the telephone when the informer called or had any part in the transportation of narcotics in this

Cadillac automobile. To the contrary, Everett Brown was not in the Cadillac on any of the occasions, and the agents so testified. And, when Kado Barrow was arrested, he was in a Yellow taxicab with narcotics on his person (Tr. 95). There is also a total lack of evidence on the point as to how Kado Barrow happened to be in possession of the automobile and a total lack of evidence connecting Brown in any way with Barrow in transporting narcotics in the automobile. Nor was any evidence adduced that Brown had either expressly or impliedly given permission to Barrow to use the Cadillac automobile. The conviction of Everett Brown for violation of the narcotics law was not in connection with the use of the Cadillac (Tr. 74, 77). The libel of information in the present case does not mention Kado Barrow, but states "that the said contraband articles had been possessed and concealed and were then and there possessed and concealed in or upon said automobile and in or upon the person of Everett Brown while in or upon said automobile." (Tr. 3).

FINDINGS.

The trial Court found that Everett Brown had not expressly or impliedly authorized Kado Barrow to have possession of the Cadillac, and that he was in illegal possession of it in the transportation of narcotics. The Court further found that Jack Andrade was a stranger to both Barrow and Brown and acted in good faith when selling the Cadillac to Brown.

ARGUMENT.

BASIC PURPOSE OF FORFEITURE STATUTE RELATES TO COLLECTION OF TAXES.

It has been held that Title 49, U.S.C.A., Section 782, providing for forfeiture of a vehicle used in connection with the conveyance of contraband articles, is constitutional as having a direct relation to the efficient collection of taxes.

U. S. v. Chiles (D.C. Ga. 1942), 43 F. Supp. 776;

U. S. v. One 1941 Chrysler Brougham Sedan (D.C. Mich. 1947), 74 F. Supp. 970.

TRIAL COURT IS SOLE JUDGE OF PROBABLE CAUSE.

Burden of proof rests upon claimant provided "That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof, etc."

Title 19, U.S.C.A., Section 1615.

Obviously, the revenue laws would be violated with impunity if the Government had to prove matters possibly known only to the alleged violator. However, there are recognized limitations, as stated in *U. S. v. The J. Duffy*, 14 F. (2d) 426, at page 429:

"If the true construction of that statute is that in a suit to enforce a confiscation the burden of proving his innocence lies upon the owner of the property sought to be confiscated, then I would have no hesitation in declaring that statute unconstitutional. To call such a suit dominated by

such a procedural rule 'due process of law' is to delete all significance of the constitutional guaranty. In civil suits, the burden of proving his case by a 'fair preponderance of evidence' lies on the plaintiff. In criminal actions, the burden of proving the crime beyond a reasonable doubt lies on the state. Are we to understand in suits aiming at confiscation the whole theory of our judicial procedure is reversed; that wholly irrespective of whether a *prima facie* case has been presented or a case of probable cause, property stands confiscated to the Government unless the owner manages in some way to disprove something that has not even been charged or proven. The statute does not go to such lengths. It may well be that the burden of proof is *shifted* to the claimant when 'probable cause has been sufficiently shown' *to be judged of by the court*.

"I can conceive of no adequate showing of probable cause short of a *prima facie* case. Indeed the intendment of the statute, as I read it, is merely to make such a *prima facie* case adequate to the purpose of confiscation, unless the claimant then assumes the burden of proof."

This case well states the distinction the Government attorneys frequently disregard. They proceed recklessly, anticipating the might of the Government will terrorize opposition and so confiscate property to the injury of innocent people. The present case is an example. The libel named Everett Brown, the purchaser of the car, as the one who transported narcotics in it. At the trial, Everett Brown was not even mentioned in connection with the car, except as the owner,

and one Kado Barrow was shown to be the culprit by the Government's witnesses. This fact, when emphasized, was waived aside by the United States attorney as of no importance, who expected the Court to draw an inference of guilt with no evidence to support it. We admit Everett Brown, who purchased the car, resided at 1430 O'Farrell Street. We admit he was convicted of trafficking in narcotics. We admit that Kado Barrow used the car to transport narcotics, but that is the extent of the evidence. Nothing in the record establishes even indirectly that Kado Barrow had the permission of Everett Brown to use the car. The Court would have to infer permission. The opposite inference, and the one which possibly influenced the Court, was that Kado Barrow did not have permission of Brown to use his car and expose it to a possible seizure and forfeiture. Brown himself did not use the car for such purpose, although the Government proved he was a dealer in narcotics.

Evidence is entirely wanting that there was any connection between Brown and Barrow. They were not seen together, nor did either one make a statement the car was used with Brown's permission. It was within the Government's power to prove the point by Brown or Barrow, but not even an offer of evidence to such effect appears in the record. We have consequently a situation where the purpose of the statute is violated. An innocent person without knowledge is demanded by the Government to establish facts the Government itself was in a better position to prove.

The burden of the cases prosecuted under this statute largely is based on the presumed better knowledge of the claimant, as exemplified in *U. S. v. Fraser* (C.C. S.C. 1890), 42 F. 140:

“Where defendant is found in possession of smuggled goods, it is incumbent upon him to explain his possession to the satisfaction of the jury. Otherwise he will be found guilty.”

Appellant says that the burden of proof shifted to the claimant and cites several cases:

The first—*U. S. v. One 1937 Hudson Terraplane Coupe*, 21 F. Supp. 600. The claimant was a conditional vendor of an automobile which was used to transport narcotics by a person who had the consent of the vendee. The trial Court was upheld in declaring the forfeiture. There was no doubt that the user of the car had the consent of the owner, but such consent was not proved in the instant case.

The next—*U. S. v. One Dodge Coupe*, 43 F. Supp. 60. In this case, the conditional vendee himself apparently was in the automobile violating the narcotics act. No other evidence was offered by the conditional vendor claimant, and the car was forfeited.

The next case cited by appellant is *General Motors Acceptance Corp. v. U. S.*, 63 F. (2d) 209. Here, again, the conditional vendee was proved violating the law, and the conditional vendor was denied the right to recover the car. The distinction is clear in all these cases: either the purchaser of the car himself

was operating it in violation of the law or someone who had his consent was doing so. Again, we emphasize it was not shown that Kado Barrow, convicted of illegal use of this Cadillac, had the consent of the purchaser, Brown, to use the car. The same holds true with respect to the other cases cited by appellant.

A case directly in point is *U. S. v. One Reo Speed Wagon*, 5 F. (2d) 372. Claimant, a fisherman, had allowed his son to use his automobile. The son lent the truck to one Russo, who used it in violation of the tariff and alcoholic laws. Claimant had no knowledge of Russo or his purpose. The Court, in denying the forfeiture, said that the Government had not shown probable cause, declaring there must be something more than slight evidence, something more than speculation or suspicion to establish probable cause.

Another case, even stronger, is *Platt v. U. S.* (C.C.A. Okla. 1947), 163 F. (2d) 165. A mother, knowing her daughter was a dope addict, permitted the daughter to use her automobile to go to a drugstore, but not knowing that she intended to obtain morphine. The Court held that the automobile was not subject to forfeiture on the ground that it was used to "facilitate" the purchase of the morphine, since the use of the automobile merely enabled the daughter to get to the drugstore, but did not facilitate the purchase of the morphine. This indicates the tendency not to extend this highly penal statute unnecessarily.

Another case is *U. S. v. One 1938 Chevrolet, etc.* (S. Car. 1948), 78 F. Supp. 676. Mrs. Autry, owner of an automobile, had lent it to her husband who, while intoxicated, permitted a third person to use the car, who, in doing so, violated the narcotics law. The Court held Mrs. Autry could recover the automobile, that no consent could be implied on the part of her husband to the use of the automobile while he was in a state of intoxication.

In *People v. One 1937 Plymouth 6, etc.*, 37 C. A. (2d) 65, which involved a proceeding under the California State Narcotics Act, appears the following language at pages 70, 71:

“In *United States v. One Buick Roadster*, 280 Fed. 517, the court said at page 519: ‘The fiction that the thing is guilty is but a convenience of procedure, to visit justice by way of forfeiture upon those, perhaps unknown, whose conduct contributed to the thing’s lawful use. Otherwise, outlawry, the superstitions of deodand and trial and punishment of inanimate things, have disappeared, and it is doubtful if any modern law purports to confiscate lawful property because unlawfully used by trespasser or thief. If section 3450 does, how can it be maintained in view of the due process clause of the Constitution? What is it but a mere arbitrary act of government in violation of that fundamental right to own property, for the security of which society is organized and government maintained? What immemorial practice of government justifies this legislative power? Wherein are public welfare, and rights common to all, served by this invasion

of individual right of property? What principle of justice permits it? To support the proponent no answer comes to mind, and until successfully answered it must be held that the literal import aforesaid of section 3450 contravenes the due process clause, to avoid which, its general terms permitting, again it will be presumed that Congress intended exceptions of trespasser and thief.' (See, also, *United States v. One Reo Speed Wagon*, 5 Fed. (2d) 372, 373; *United States v. One Ford Coupe Automobile*, 21 Fed. (2d) 639, 640; *United States v. One Dodge Truck*, 9 Fed. Supp. 157, and cases therein cited; *State v. Goyette*, 140 Kan. 732 (37 Pac. (2d) 1001); compare *United States v. One Haynes Automobile*, 290 Fed. 399.) The line of demarcation established in these cases is whether or not the owner has consented to the use of his property. If he has not, his property is not subject to forfeiture. If he has, the property may be forfeited regardless of his lack of knowledge of or consent to the unlawful use. Such distinction appears sound in view of the decision in *Goldsmith, Jr.-Grant Co. v. United States*, *supra*, and the line of decisions in the federal courts has sprung directly from that case.

"We are unable to appreciate how appellant is able to draw any distinction, which he indicates should be drawn, between use by a thief, and use by a person without the consent or permission of the owner. The latter use is unlawful, constituting a trespass or conversion, and the act of driving an automobile without the owner's consent is now a crime. (Vehicle Code, sec. 503.) The dif-

ference is one only of degree and is too slight to justify any distinction.

“Appellant strongly argues that if the owner may defend against a forfeiture by proof that the vehicle was used without his consent or permission, the way is opened for collusion and perjury in an attempt to defeat forfeiture. Such a consideration is one to be met by the careful scrutiny of the trial judge, who has at the trial an opportunity to view the witnesses and weigh the credibility of the evidence offered. It is not a sufficient consideration to justify an apparent arbitrary invasion by the legislature of property rights protected by both the state and federal Constitutions.”

We quote this case at length for the true distinction it makes in these forfeiture cases. And, again, we say the trial judge, in the absence of evidence that Kado Barrow had the consent of Everett Brown to use the automobile, was right in finding Barrow was illegally in possession of the car. The question was properly for the decision of the trial Court. It is well settled that the Federal Court of Review will indulge in all necessary presumptions not inconsistent with the record to uphold the proceedings and rulings in the Court below.

Loring v. Frue, 104 U. S. 223, 26 L. ed. 713;

Johnson v. American Hawaiian Steamship Co.,
98 F. (2d) 847.

Furthermore, findings of fact are not to be set aside unless clearly erroneous, where the finding is of a

fact concerning which there was a conflict of testimony or of a fact deduced or inferred from uncontradicted testimony.

Federal Rules of Civil Procedure, Rule 52(a);
U. S. v. Still, 120 F. (2d) 876.

Section 1615, Title 19, U.S.C.A., relating to burden of proof in forfeiture proceedings, after stating the burden of proof shall be upon the defendant, continues:

“* * * Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

“(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

“(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise (sic) or containers of merchandise shall be prima facie evidence of the foreign origin of such merchandise.

“(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or

communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel. (June 17, 1930, c. 497, Title IV, Sec. 615, 46 Stat. 757; Aug. 5, 1935, c. 438, Title II, Sec. 207, 49 Stat. 525.)”

It will be noted that there are three enumerated situations only where certain things shall constitute prima facie evidence. The instant case does not come within any of these rules; a further indication that the harsh rule insisted upon by appellant is inapplicable.

It is interesting to consider that Title 49, U.S.C.A., Section 784, “Application of related laws,” contained on the last page of appellant’s Appendix to opening brief, provides for remission or mitigation of forfeitures. The Supreme Court apparently has not passed on this section in connection with narcotics. It is submitted that the trial Court has the power of remission or mitigation of forfeitures inasmuch as Section 784 is part of the chapter on seizure and forfeiture for transporting narcotics.

In *U. S. v. One 1941 Plymouth Tudor Sedan* (C.C.A. Okla. 1946), 153 Fed. (2d) 19, Section 784 was held limited to vehicles used in transporting liquor in violation of the revenue laws only. The statute does not so limit the section. The same ruling was made in *U. S. v. 1946 Plymouth Sedan* (D.C. N.Y. 1946), 73 F. Supp. 88.

Notwithstanding these decisions to the contrary, it is submitted the power of remission is vested in the

Court where narcotics are involved as well as illicit alcohol. This is not advanced as decisive of the case, but as indicative of the latitude to be observed in protecting the rights of the innocent.

CONCLUSION.

In brief, the order denying forfeiture should be sustained because it was not proved Kado Barrow was driving with the consent of the purchaser of the Cadillac when it was found in Barrow's possession. On the contrary the finding of lack of consent and illegal possession is supported by the evidence.

Dated, San Francisco, California,

May 2, 1949.

Respectfully submitted,

FRED A. WATKINS,

Attorney for Appellee.

No. 12120

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA
CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD,
JAMES E. DOGGETT and RALPH BAKER,

Appellees.

Appeal from the United States District Court for the
Southern District of California
Central Division

BRIEF FOR APPELLANTS.

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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statute involved	2
Statement of the case.....	3
Proceedings	3
Allegations of the complaint.....	3
Opinion of the court below.....	6
Specification of errors.....	6
Points to be argued and summary of argument.....	7
Argument	9

I.

The complaint states a cause of action under Section 47(3). The lower court erred in holding that Section 47(3) is in- applicable to interferences by private individuals with the privileges here involved.....	9
A. Controlling decisions by the United States Supreme Court establish that the complaint states a cause of action under Section 47(3).....	9
Summary of principles determined by decisions.....	9
1. The Fourteenth Amendment cases, on which the District Court relies, have no bearing on federal protection against private individuals of the type of privilege here involved.....	11
2. The controlling Supreme Court decisions establish the applicability of Section 47(3) to acts of pri- vate individuals	13
3. The controlling Supreme Court decisions establish that the privilege here involved is protected by Section 47(3)	17
4. Summary of Section 241 cases.....	20

B. The language and legislative history of Section 47(3) establish that the instant complaint states a valid cause of action thereunder.....	21
1. Language of 47(3).....	21
2. Legislative history of 47(3).....	23
The District Court's erroneous explanation of the term "equal"	26
C. Construction of Section 47(3) as embracing the instant cause of action is entirely consistent with established principles of federal-state relations.....	27

II.

Section 47(3), construed as embracing the cause of action stated in the instant complaint, is constitutional.....	31
Conclusion	31

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bomar v. Keyes, 162 F. 2d 136.....	22, 26
Civil Rights Cases, 109 U. S. 3.....	12
Colgate v. Harvey, 296 U. S. 404.....	28
Crandall v. Nevada, 6 Wall. 35.....	19
Foss v. United States, 266 Fed. 881.....	15
Hague v. C. I. O., 307 U. S. 496.....	18, 28
Hodges v. United States, 203 U. S. 1.....	14
James Stewart & Co. v. Sadrakula, 309 U. S. 94.....	28
Lawson v. Suwanee Fruit and Steamship Co., 93 L. Ed. (Adv. Op.) 470	21
Logan v. United States, 144 U. S. 263.....	11, 14, 16, 19, 31
Love v. Chandler, 124 F. 2d 785.....	9
Mitchell v. Greenough, 100 F. 2d 184.....	15
Motes v. United States, 178 U. S. 458.....	15, 16
O'Sullivan v. Felix, 233 U. S. 318.....	9
Picking v. Pennsylvania R. Co., 151 F. 2d 240.....	11
Powe v. United States, 109 F. 2d 147.....	19, 31
Quarles and Butler, In re, 158 U. S. 532.....	11, 13, 15, 18, 19, 31
Screws v. United States, 325 U. S. 91.....	16, 21, 23, 30
Selective Draft Law Cases, 245 U. S. 366.....	24
Slaughter-House Cases, 16 Wall. 36.....	18
Snowden v. Hughes, 321 U. S. 1.....	30
United States v. Classic, 313 U. S. 299.....	14, 16, 21, 23
United States v. Cruikshank, 92 U. S. 542.....	14, 16, 18, 31
United States v. Gaskin, 320 U. S. 527.....	27
United States v. Mosley, 238 U. S. 383.....	14, 16, 22, 23, 30
United States v. Waddell, 112 U. S. 76.....	15, 16
United States v. Wheeler, 254 U. S. 281.....	14, 28
Virginia, Ex parte, 100 U. S. 339.....	18
Yarbrough, Ex parte, 110 U. S. 651.....	11, 14, 16, 18, 28, 31

MISCELLANEOUS

PAGE

Carr, Federal Protection of Civil Rights (1947), pp. 14, 60, 148-149	30
Carr, Federal Protection of Civil Rights (1947), p. 36.....	24
Flack, The Adoption of the Fourteenth Amendment (1908), p. 235	24
Congressional Globe, 42d Cong., 1st Sess., 1871.....	
.....11, 23, 24, 25, 26, 27	
6 Lawyers Guild Review (1946), pp. 643, 645, Constitutional Basis for Federal Anti-Lynching Legislation.....	24
Report of President's Committee on Civil Rights (1947), pp. 117-118, To Secure These Rights.....	30

STATUTES

Act of May 31, 1870, Sec. 6.....	10
Act of April 20, 1871, Sec. 2 (Chap. 22, Sec. 2, 17 Stats. 13)....	2
California Constitution, Art. VI, Sec. 2.....	25
Judicial Code, Sec. 24(1) (28 U. S. C., Sec. 1331).....	2
Judicial Code, Sec. 24(12) (28 U. S. C., Sec. 1343(1)).....	1
Ku Klux Act, Sec. 2 (Act of April 20, 1871, Chap. 22, 17 Stats. 13)	23
United States Code, Title 8, Sec. 43	11, 21, 22, 23
United States Code, Title 8, Sec. 47.....	1
United States Code, Title 8, Sec. 47(2).....	23
United States Code, Title 8, Sec. 47(3).....	
.....2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31	
United States Code, Title 18, Sec. 51.....	10
United States Code, Title 18, Sec. 241.....	
.....10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 30	
United States Code, Title 18, Sec. 242	11, 14
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1294(1).....	2
United States Constitution, Thirteenth Amendment.....	12
United States Constitution, Fourteenth Amendment.....	12, 24, 28

No. 12120
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA
CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD,
JAMES E. DOGETT and RALPH BAKER,

Appellees.

BRIEF FOR APPELLANTS.

Jurisdiction.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered October 4, 1948, in which it granted appellees' motion to dismiss appellants' amended complaint [R. 47]. The District Court's opinion is printed at 80 Fed. Supp. 501 and R. 18-46.

The District Court had jurisdiction over the action under the terms of the Judicial Code, Section 24(12), as amended (28 U. S. C. 1343(1)) which provides for jurisdiction over suits for damages based on acts done in furtherance of any conspiracy mentioned in Section 47 of Title 8 of the United States Code; the instant action is a suit for damages based on such acts [see Complaint, R. 2-9]. The District Court also had jurisdiction under the

Judicial Code, Section 24(1), as amended (28 U. S. C. 1331), in that the cause of action arose under the Constitution and laws of the United States and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars [see Complaint, R. 2-9].

This Court has jurisdiction of this appeal under 28 U. S. C. 1291 and 1294(1).

Statute Involved.

This action was brought under that part of Section 2 of the Act of April 20, 1871 (c. 22, §2, 17 Stat. 13) which has become Section 47(3) of Title 8 of the United States Code (to be hereinafter termed Section 47(3)). It provides:

§47. Conspiracy to interfere with civil rights

* * * * *

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election

of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Statement of the Case.

Proceedings.

The pleadings consist solely of appellants' amended complaint praying for damages under Section 47(3) [R. 2-9], and the appellees' motion to dismiss the complaint for failure to state a cause of action [R. 9-10]. The District Court granted such motion to dismiss [R. 47].

Allegations of the Complaint.

The facts as stated in the complaint, which are to be deemed admitted for the purposes of the motion to dismiss, are that the appellants, all of whom are citizens of the United States, are members of the Crescenta-Cañada Democratic Club (hereinafter called "the Club"), appellant Morse being its Chairman, and appellant Hardyman being Chairman of its Program and Publicity Committee [R. 2]. The Club, a voluntary association, was duly or-

ganized and chartered by the Los Angeles County Democratic Central Committee as an officially recognized Democratic Club. Its chief purposes were participation in the election of officials of the United States, including the President, Vice-President, and Members of Congress; petitioning the national government for the redress of grievances; and engaging in public meetings for the discussion of national public issues, including the international and foreign policies of the United States [R. 2-3].

In accordance with these purposes and with its customary practice of holding regular public meetings respecting national issues, the Club scheduled and arranged for a regular public meeting in the City of La Crescenta for the evening of November 14, 1947, at which the foreign policy of the United States, and in particular the Marshall Plan, was to be discussed by a speaker and by those attending the meeting. It was further scheduled that the officers of the Club would present a resolution opposing the Marshall Plan to such meeting for adoption; and such resolution, if adopted, would be forwarded to the President of the United States, the State Department, and the members of Congress, in order to petition for a redress of grievances with respect to the Marshall Plan [R. 4-5]. At previous meetings the Club had adopted such resolutions and so forwarded them to such officials [R. 4-5].

A few days prior to November 14, the appellees, knowing of the meeting scheduled by the appellants for that date, and of its program and purposes, conspired to interfere with and break up such meeting, and to prevent the

adoption and transmission of the proposed resolution [R. 5-6]. Appellees formed this conspiracy because they were opposed to the views of the Club's membership, including appellants, which had been previously expressed in resolutions respecting the Marshall Plan and which were again to be expressed at the November 14th meeting [R. 5-6]. In furtherance of such conspiracy the appellees went to the Club meeting of November 14th; by threatening to assault and in fact assaulting appellants, and by ordering those attending the meeting to leave, appellees forced the meeting to disperse without completion of the scheduled discussion of national affairs and without the adoption and transmission of the scheduled resolution [R. 7-8]. Appellees had not so conspired or interfered with numerous public meetings scheduled and held prior to November 14th with the knowledge of appellees, by organizations expressing views with which appellees agreed, at which resolutions were adopted respecting the foreign policies of the United States [R. 6].¹

The appellants prayed for damages on the basis of the deprivation they suffered with respect to their constitutional rights, as well as their other injuries, and asked punitive damages because of the malicious nature of appellees' acts [R. 8].

¹The complaint also alleged that appellees disguised themselves by the unlawful and unauthorized wearing of American Legion caps [R. 7]. Upon this appeal, however, we accept the District Court's view that the wearing of such caps did not constitute a disguise within the meaning of 47(3) [R. 30-31].

Opinion of the Court Below.

The Court below appeared to recognize that Congress has the constitutional power to establish a civil right of action against private individuals who interfere with the constitutional privilege here involved: of assembling to petition Congress and discuss national affairs [R. 20, 21, 23]. Nevertheless, the lower Court held that Section 47(3) does not establish a cause of action for interference with this privilege unless the interference is committed by the State or a person acting for it [R. 34]; on this basis the Court concluded that the instant complaint failed to state a cause of action [R. 40-41]. In arriving at this construction of Section 47(3) the lower Court, despite its apparent recognition that the privilege here involved is guaranteed under the original Constitution absent the amendments, relied heavily upon decisions under the Fourteenth Amendment which held that the Federal Government is empowered to protect the rights assured thereunder only against State action [R. 23-26, 35-39]. The District Court also rested its construction on its belief that all previous civil and criminal civil rights actions had been against persons possessing State authority [R. 32].

Specification of Errors.

The District Court erred in dismissing the complaint for failure to state a cause of action, on the ground that Section 47(3) does not apply to private individuals such as appellees, and only applies to persons acting for the State.

Points to Be Argued and Summary of Argument.

I. THE COMPLAINT STATES A CAUSE OF ACTION UNDER SECTION 47(3). THE LOWER COURT ERRED IN HOLDING THAT SECTION 47(3) IS INAPPLICABLE TO INTERFERENCES BY PRIVATE INDIVIDUALS WITH THE PRIVILEGES HERE INVOLVED.

A. The District Court erred by determining the scope of Section 47(3) on the basis of Supreme Court decisions dealing with the Fourteenth Amendment; for these decisions themselves recognize that civil rights other than those guaranteed by the Fourteenth Amendment may be directly protected by the Federal Government against interference by private individuals. The Fourteenth Amendment and doctrine concerning it is not relevant in the instant case because the privileges to petition Congress and to assemble to so petition and discuss national affairs are guaranteed by the original Constitution absent the Amendments.

B. The Supreme Court decisions dealing with the section of the civil rights legislation which is the criminal counterpart of 47(3) are of controlling authority with respect to its construction. They clearly demonstrate the validity of the instant cause of action. For the Supreme Court has repeatedly upheld the application of the criminal section to private individuals; further, the Court has emphatically asserted its applicability to interferences by private individuals with the very privilege here involved: the privilege of assembling to petition Congress and discuss national affairs. These decisions are controlling in

the instant case not only because they establish principles apposite to the construction of 47(3) and show the irrelevance of the cases utilized by the District Court, but also because 47(3) must be construed *in pari materia* with its criminal counterpart.

C. While we believe the language of 47(3) demonstrates the congressional intention to establish the instant cause of action, the legislative history unmistakably proves this intention in the event the language is deemed open to any other construction.

D. Because of the nature and extremely limited range of the privileges subject to protection by Section 47(3) under the construction here urged, there is no merit in the District Court's view that validation of the instant cause of action would result in a broad area for Federal redress against private individuals.

II. SECTION 47(3), CONSTRUED AS EMBRACING THE CAUSE OF ACTION STATED IN THE INSTANT COMPLAINT, IS CONSTITUTIONAL.

It seems to be conceded in the District Court opinion, and the Supreme Court opinions uncontrovertibly establish, that the cause of action stated in the instant complaint could constitutionally be established by Section 47(3).

ARGUMENT.

I.

The Complaint States a Cause of Action Under Section 47(3). The Lower Court Erred in Holding That Section 47(3) Is Inapplicable to Interferences by Private Individuals With the Privileges Here Involved.

A. Controlling Decisions by the United States Supreme Court Establish That the Complaint States a Cause of Action Under Section 47(3).

SUMMARY OF PRINCIPLES DETERMINED BY DECISIONS.

The gravamen of the instant complaint is that the appellees, a group of private individuals, conspired to deprive appellants of their equal privileges within the meaning of Section 47(3), by conspiring to prevent appellants from continuing a meeting called to petition Congress and discuss national affairs [R. 4-7].

The validity of this cause of action, as well as the lower Court's error in relying upon the Fourteenth Amendment and the cases thereunder, are clearly demonstrated by the Supreme Court's decisions with respect to the section of the civil rights statutes which is the criminal counterpart of Section 47(3).

While Section 47(3) has not itself been before the Supreme Court,² the Court has, contrary to the District

²*O'Sullivan v. Felix*, 233 U. S. 318, involved an action against a private individual based on a deprivation of the right to vote; however, the validity of the cause of action under 47(3) was conceded and the opinions only involved the statute of limitations. (See Circuit Court opinion: 194 Fed. 88.)

Neither does there appear to be any Circuit Court opinion bearing on the instant question other than *Love v. Chandler*, 124 F. 2d 785

Court's statement [R. 32], repeatedly upheld the application of the criminal section, herein to be termed Section 241,³ to acts of private individuals. For, under the original Constitution, absent the Amendments, the Federal Government is deemed to guarantee directly to the citizen the small group of rights and privileges which are vital to its existence as a Republic against all interference, including that by private individuals. It is these rights and privileges which, according to the Supreme Court's repeated statements, Section 241 protects; furthermore, the privileges involved in the instant cause of action are, according to the Supreme Court's unequivocal declarations, among this special and fundamental group of privileges. The Court's decisions as to Section 241 are, we submit, controlling herein not only because of the principles they establish, but also for the compelling reason that Sections 47(3) and 241 are *in pari materia*⁴ and the former must therefore be given a similar construction to that accorded the latter by the Supreme Court.

(C. C. A. 8, 1942). There the right involved: to WPA employment,—was held not to be among those guaranteed by the Constitution. The Court also seems to have based its dismissal of the cause of action on the inapplicability of 47(3) to private individuals, though this part of the opinion does not seem necessary to the decision, both because of the holding as to the status of WPA employment and because of the actual official standing of the defendants.

³The criminal section, at present codified as 18 U. S. C. 241, had its origin as Section 6 of the Act of May 31, 1870; it was incorporated in the Revised Statutes and the Criminal Code, and constituted Section 51 of Title 18 of the United States Code, prior to the present re-codification of Title 18. It will be referred to herein as Section 241 regardless of the time element.

⁴That Section 47(3) must be given the same construction as Section 241 is indubitable from the legislative history. According to the Chairman of the Select House Committee which drafted the

1. THE FOURTEENTH AMENDMENT CASES, ON WHICH THE DISTRICT COURT RELIES, HAVE NO BEARING ON FEDERAL PROTECTION AGAINST PRIVATE INDIVIDUALS OF THE TYPE OF PRIVILEGE HERE INVOLVED.

In the long line of cases dealing with Section 241, the Supreme Court has repeatedly emphasized the irrelevance of the Fourteenth Amendment, stating that the basic privileges of citizens with which 241 is concerned do "not depend upon any of the Amendments to the Constitution but arise(s) out of the creation and establishment by the Constitution itself of a national government."⁵ Thus, as the Court stated in a Section 241 decision, in words applicable to the suit at bar: "Reference to cases under . . . the Fourteenth Amendment . . . can afford no aid in the present case."⁶

While the lower Court opinion adverts to the cases establishing that the privilege here involved is one of the

statute from which 47(3) is derived, the section embodying 47(3) was identical in its legal grounds with 241, its purpose being merely to clarify Section 241 and render it less vague and general (Congressional Globe, 42nd Cong., 1st Sess. 1871, hereinafter cited as "Cong. Globe," Appendix pp. 68-69). And see the statement of another responsible spokesman: "The measure under consideration gives a civil remedy parallel to the penal provision." Cong. Globe, page 461. See also page 383.

Compare *Picking v. Pennsylvania R. Co.*, 151 F. 2d 240, 248-9 (C. A. 3rd, 1945), where the Court held that the civil rights sections relating to acts under color of State authority (8 U. S. C. 43 and 18 U. S. C. 242) are *in pari materia* and that the civil section must be given the construction theretofore given to the criminal section by the Supreme Court.

⁵*In re Quarles and Butler*, 158 U. S. 532, 535. Practically identical language also appears in *Logan v. United States*, 144 U. S. 263, 293.

⁶*Ex parte Yarbrough*, 110 U. S. 651, 665-6.

few guaranteed under the original Constitution [R. 21],⁷ its conclusion as to the meaning of Section 47(3) is based on a confusion between this special type of privilege and the broad class of rights which are merely within the protection of the Fourteenth Amendment, instead of the original Constitution, and which therefore are susceptible of protection by the Federal Government only against State action.

All of the doctrine cited by the District Court for its view that State authority is prerequisite for a cause of action under 47(3) relates exclusively to the due process and equal protection guarantees of the Fourteenth Amendment; the cited opinions themselves explicitly recognize that constitutional guarantees other than those of the Fourteenth Amendment apply to private acts.⁸ Since, as we

⁷These cases are discussed in detail, *infra*, pp. 17-20.

⁸Thus, in the *Civil Rights Cases*, 109 U. S. 3, upon which the District Court relies extensively [R. 23, 24-25, 42], the Court held unconstitutional a Federal statute penalizing private discrimination against Negroes, stating that the Fourteenth Amendment could not be construed to grant Federal power over individual acts or else Congress could enforce "all rights of life, liberty, and property." At the same time, however, the Court recognized that this Amendment posed a peculiar problem, and that in other respects, as in the instance of the civil rights protected by the Thirteenth Amendment, Congress could regulate "the conduct and transactions of individuals."

Similarly, the matter quoted from the *Harris* case [R. 42, note 15] relates solely to the distinct question of the scope of the Fourteenth Amendment, the Court conceding that the Thirteenth Amendment, for example, afforded direct protection by the Federal Government to private individuals (106 U. S. at p. 639). In *Shelley v. Kraemer* [R. 35-36, 38], the only possible source for Federal protection of the right there involved was the Fourteenth Amendment, and the entire opinion is therefore concerned with it.

The Eighth Circuit Court's opinion in *Love v. Chandler* [R. 22-23, 34-35] is, we submit, based on erroneous interpretations and applications of Supreme Court opinions, similar to the District Court's herein.

shall show in detail below (pp. 17-20), the privilege here in issue is in the category of those rights that are directly guaranteed by the Constitution against interference by private individuals, the principles and decisions with respect to the Fourteenth Amendment are entirely irrelevant to the question of the applicability of Section 47(3) to interferences by private individuals with this privilege.⁹

2. THE CONTROLLING SUPREME COURT DECISIONS ESTABLISH THE APPLICABILITY OF SECTION 47(3) TO ACTS OF PRIVATE INDIVIDUALS.

The Supreme Court has repeatedly upheld the application of Section 241 to acts of private individuals, explicitly rejecting such reasoning as the lower Court's with respect to the exclusive jurisdiction of the State courts over all such acts. With no doubt at any time that Section 241 was intended to apply to private individuals, the Court's only concern in these cases has been as to whether the right with which the individual interfered was included in the narrow category of those deemed to be of national character. The underlying principle of these decisions is that the Federal Government has implied constitutional power, arising from the very fact of its establishment and necessary to its "independence and supremacy,"¹⁰ to furnish direct protection, independent of the states, to intrinsically national rights.

⁹And the assumption that the civil rights statutes were enacted to enforce the Thirteenth and Fourteenth Amendments [R. 22] not only is undermined by the Supreme Court's decisions on Section 241, but, so far at least as Section 47(3) is concerned, is shown to be factually inaccurate by that section's legislative history (see *infra*, pp. 23-26).

¹⁰*In re Quarles and Butler*, 158 U. S. 532, 537.

Thus, in the earliest and leading case, *United States v. Cruikshank*, 92 U. S. 542 (1876), the Court concluded that the general right of assembly which was there attacked by private individuals was not related exclusively to Federal functions and therefore could not be protected against private individuals by the Federal Government; the Court stated emphatically, however, that if "the object of the defendants [had been] to prevent a meeting" for the purpose of "consultation in respect to public affairs and to petition for a redress of grievances," "the case would have been within the statute" (at pp. 552-553). The *Cruikshank* doctrine as to Section 241's application to interferences by private individuals with rights of a national character was followed in the *Yarborough* decision,^{10a} where the Court held that the right to vote at a congressional election was subject to direct protection by the Federal Government against private individuals. And see the *Classic* case, for an assertion of the *Yarborough* holding in the present decade.¹¹

Indeed, with respect to a variety of rights the Court has reiterated the doctrine that interferences by private individuals with rights and privileges vital to the functioning of the Federal Government are covered by Section 241, holding the section inapplicable only when the affected right was not in this category.¹² Thus, in *Logan v. United*

^{10a}*Ex parte Yarborough*, 110 U. S. 651.

¹¹In *United States v. Classic*, 313 U. S. 299 (1941), the Court stated that the right to choose members of Congress "is secured against the action of individuals as well as of States" (at p. 315). However, the defendants were in fact State election officials and the action was brought under 18 U. S. C. 242, which applies to deprivations by persons acting under color of State authority, as well as Section 241. (*Semble: United States v. Mosley*, 238 U. S. 383.)

¹²As in *United States v. Wheeler*, 254 U. S. 281. And see *Hodges v. United States*, 203 U. S. 1.

States, 144 U. S. 263, a judgment of conviction under Section 241 was affirmed against private individuals who had attacked persons in the custody of a Federal marshal, thus depriving the latter of the right to be free from violence while in such custody. The Court answered the argument that the attackers could be prosecuted under State law, by stating that the right affected was not "a right which can be vindicated only under the laws of the several states" (at p. 282) and that this right could "be affirmatively enforced . . . against individuals" by the Federal Government (at p. 293). To the same effect, affirming convictions for interferences with similar rights: *In re Quarles and Butler*, 158 U. S. 532 (see especially p. 537), and *Motes v. United States*, 178 U. S. 458. And in *United States v. Waddell*, 112 U. S. 76, the Court held that Section 241 was validly applied to a private individual who deprived another person of the right under a Federal statute to perfect his claim to a homestead. Similarly, this Court, on the basis of *Waddell* and others of the above-discussed decisions, expressed no doubt as to the applicability of Section 241 to private individuals, and upheld the conviction of a private individual for depriving another person of the right of testifying in a land contest before a Federal official.¹³

The District Court denied to these decisions the controlling effect which must be accorded to them in determin-

¹³*Foss v. United States*, 266 Fed. 881 (1920). It is to be noted that this Court in the *Foss* case considered the *Sanges* decision, cited by the lower court [R. 45, note 31], to be erroneous (266 Fed. at 883).

In *Mitchell v. Greenough*, 100 F. 2d 184 (1938), which is cited by the District Court [R. 41] and which appears to be the only other decision of this Court of possible relevance, there was no occasion to consider the applicability of the statute to private individuals, the defendants clearly being State agents.

ing the applicability of Section 47(3) to acts of private individuals. To some of these cases it gives no attention;¹⁴ and others it explains on grounds which the Supreme Court has itself rejected, or on the basis of facts lurking in the record to which the Court did not advert.¹⁵ Whatever the justifiability of disregarding a unique Supreme Court opinion on such bases, such an approach is hardly permissible where there is, as here, a consistent line of holdings and detailed articulations of their doctrinal foundation.

We submit that the Supreme Court decisions uncontroversially establish the applicability of Section 241 to interferences by private individuals with rights that are deemed primarily Federal and are directly guaranteed by the Federal Government under the original Constitution. These decisions thus contradict the District Court's theories that Federal protection of civil rights is and should be uniformly restricted to protection against State action, and that the civil rights statutes have not been applied to private individuals. On the contrary, not only do the Su-

¹⁴Such as the *Cruikshank*, *Waddell*, *Motes* and *Foss* cases, all discussed *supra*.

¹⁵Thus, while it is true as a factual matter that the victim of the defendant's act in the *Yarbrough* case was a Negro [R. 32, 45 at note 33], the *Yarbrough* holding and doctrine was based on the right of all citizens, regardless of race, to vote for Congressmen; and in the *Classic* case the Court pointed out that race was irrelevant in the establishment of a civil rights act offense unless it was expressly made an element by statute. (313 U. S. at 327.) To the same effect, see *Screws v. United States*, 325 U. S. 91, at 98-99. And compare *United States v. Mosley*, 238 U. S. 383, at 387.

In the *Logan* case [R. 32 at note 34] it is true that the lengthy Statement of Facts by the Reporter mentions in passing that the defendants were in league with the prisoners' guards, but the Court in no way adverted to this fact. As to the *Quarles* case [R. 32 at note 31] we are unable to discern in the report of the case the connection of the defendants with a public body.

preme Court's decisions on Section 241 countenance the construction of 47(3) which we here urge, but these decisions indeed dictate that 47(3) should be applied to private individuals because 47(3) must be given a similar construction to that of Section 241 (see note 4 *supra*).

3. THE CONTROLLING SUPREME COURT DECISIONS ESTABLISH THAT THE PRIVILEGE HERE INVOLVED IS PROTECTED BY SECTION 47(3).

The Supreme Court decisions relating to Section 241 not only uphold its application to private individuals, but also uphold its application to interference with the specific privilege involved in the instant action: of assembling to petition Congress and discuss national affairs. For it is an essential characteristic of citizenship in a republican government, and essential to the government's continued existence as republican, that citizens have the right to formulate and express their views on national issues, without obstruction such as occurred in the case at bar. Accordingly, the privilege here in issue is one of the small group of privileges deemed to be primarily Federal which Congress may protect directly against private individuals.

In the words of the Supreme Court:

"The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If . . . the object of the defendants was to pre-

vent a meeting for such a purpose, the case would have been within the statute [Section 241]." (*United States v. Cruikshank*, 92 U. S. at p. 552).

Semble: *In re Quarles and Butler*, 158 U. S. 532, 535.¹⁶

In addition to the Court's explicit statements as to the status of this privilege, all the Court's analyses of the scope of the Federal civil rights that are directly protected by the Constitution, and thus by Section 241, unmistakably indicate its inclusion among them. For whether the criterion of such rights be formulated in the terms laid down in the *Cruikshank* case; or in terms of the "rights . . . essential to the healthy organization of the government itself";¹⁷ or in terms of the rights which "arise(s) out of the creation and establishment by the Constitution itself

¹⁶Compare *Hague v. C.I.O.*, 307 U. S. 496, 512: "Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation . . ." (Opinion of Justices Roberts and Black, in which Chief Justice Hughes and Justice Stone concurred in this respect).

In their ruling upon the privileges and immunities protected by the Fourteenth Amendment, these Justices said "it is clear that the right peaceably to assemble and to discuss these topics ["matters growing out of national legislation"] and to communicate respecting them . . . is a privilege inherent in citizenship of the United States which the Amendment protects . . . No expression of a contrary view has ever been voiced by this court" (at 512-513). See also *Slaughter-House Cases*, 16 Wall. 36. It would seem, though it is not necessary to decide in the instant case because of the Supreme Court's express inclusion of this privilege among those guaranteed directly to citizens under the original Constitution, that if a privilege is deemed secured to citizens against State abridgment under the Fourteenth Amendment, it should, by the same token, be deemed guaranteed directly to citizens under the original Constitution. Compare *Ex parte Virginia*, 100 U. S. 339, 345. It is to be noted that the privileges of citizenship protected by the Fourteenth Amendment, as well as those protected by the original Constitution, are extremely limited in number (see *infra*, note 35).

¹⁷*Yarbrough*, 110 U. S. at 666.

of a national government” and which are necessary to its “independence and supremacy”;¹⁸ or in terms of those rights which are the “correlatives” to the rights of the Government¹⁹—whatever test be used, it is clear that the privilege of assembling to petition Congress and discuss national affairs must be deemed a fundamental privilege directly guaranteed to United States citizens under the Constitution by the Federal Government.²⁰

Accordingly, since Section 47(3) is to be given a similar construction to Section 241 (see *supra*, note 4), the appellees’ conspiracy to deprive appellants of this privilege states a cause of action within Section 47(3). Further—

¹⁸*Quarles*, 158 U. S. at 537; *Logan*, 144 U. S. at 293.

¹⁹*Crandall v. Nevada*, 6 Wall. 35, 44. The Court particularly stressed as such correlative rights “the right to come to the seat of government to assert any claim he may have upon that government or to transact any business he may have with it, to secure its protection, to share its offices, to engage in administering its functions.”

²⁰The rationale as to Federal protection of this privilege was well set forth in *Powe v. United States*, 109 F. 2d 147 (C. A. 5, 1947), where the Court held that no offense under Section 241 had been committed because the only right there affected was the right to discuss matters of local concern. As to the privilege of discussing national affairs, however, it stated (at p. 151):

“We do not doubt that Congress may directly protect its citizens in their right to assemble peaceably and petition the federal government for redress, just as it may protect persons from unlawful violence while in federal custody, under what are called the implied powers of Congress. * * * But in the cases supposed Congress would interfere directly only because of the necessity to maintain a federal right in its integrity. Because the federal government is a republican one in which the will of the people ought to prevail, and because that will ought to be expressive of an informed public opinion, the freedom of speaking and printing on subjects relating to that government, its elections, its laws, its operations and its officers is vital to it.”

more, aside from this principle of construction, the Supreme Court's decisions on Section 241 support our conclusion as to the validity of the instant cause of action. For they establish that the privilege described in the complaint is a privilege guaranteed by the Constitution against interference by private individuals; and the legislative history uncontrovertibly establishes,—what would in any event hardly be doubted—that the statutory phrase “privileges and immunities under the laws” refers to the privileges so guaranteed by the Constitution (see *infra*, note 30).

4. SUMMARY OF SECTION 241 CASES.

In sum, the Section 241 cases establish (1) the District Court's error in assuming that there is any general principle dictating that the protection of civil rights is a State function and that Federal protection only applies to persons acting with State authority; (2) on the contrary, there is a class of civil rights and privileges that may be directly protected by the Federal Government against the acts of private individuals, and Section 241 affords such direct protection for these rights and privileges; and (3) the privilege on which the present cause of action is based is in this category of rights and its protection against private individuals is within Section 241. The principles established in the Section 241 cases thus demonstrate the validity of the instant cause of action; furthermore Section 47(3) must be construed to embrace this cause because it must be given a similar construction to that of Section 241.

**B. The Language and Legislative History of Section 47(3)
Establish That the Instant Complaint States a Valid Cause
of Action Thereunder.**

We believe that the language of Section 47(3) unmistakably shows the congressional intent to establish a cause of action against individuals acting in a private capacity. But if indeed, the language is deemed ambiguous, the legislative history of the section, which is conclusive in the resolution of any statutory ambiguity,²¹ confirms beyond peradventure of doubt, that Congress intended 47(3) to apply to individuals acting in a wholly private capacity, and further, that the "privileges" which Congress contemplated include those here involved.

1. LANGUAGE OF 47(3).

The language of Section 47(3): a civil action may be brought "if two or more persons in any State or Territory" commit specified acts,—stands in clear contrast to the section which directly preceded it in the original enactment (now codified as 8 U. S. C. 43): a civil action may be brought against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" commits similar acts. It is hardly conceivable that Congress shifted from the "under color of" language of Section 43 to the "two or more persons" language of 47(3) with the intention, nevertheless,

²¹See the emphasis on the statutory purpose as revealed by the legislative history, in construction of the criminal sections of the civil rights acts, in *United States v. Classic*, 313 U. S. 299, at 327; *Screws v. United States*, 325 U. S. 91, 98, 99 at note 7. For a recent example of an unusual degree of reliance on statutory purpose as shown by the legislative history, see *Lawson v. Suwanee Fruit and Steamship Co.*, 93 L. Ed. (Adv. Op.) 470, decided by the United States Supreme Court February 14, 1949, where, because of the statutory purpose, the Court interpreted a term contrary to the definition thereof provided in the statute.

of carrying over the “under color of” limitation to the latter section.

Not only does the District Court’s ruling thus ignore the principle that a change of phraseology in a statute shows an intention to convey a difference in meaning, but it also ignores the converse principle that a phrase is assumed to be used in the same sense throughout. In Section 47(3), the clause under which the instant action is brought—“If two or more persons in any State or Territory conspire . . . for the purpose of depriving . . . any person . . . of equal privileges and immunities,”—is directly followed by the clause “or for the purpose of preventing or hindering the constituted authorities of any State or Territory from” engaging in certain functions. Assuming that it might be possible, as the District Court held, to interpret “persons” in the clause here involved to mean persons acting for the State, the fact that this construction was not intended is clearly established by considering “persons” in connection with the succeeding clause; under the District Court’s construction the latter clause would be operative only in the improbable circumstance that the State’s “constituted authorities” were hindered in their functions by other State agents.

Thus, it is sufficiently clear from the language of 47(3) that it applies to deprivations by private individuals, so that, as was held respecting Section 241, there is no reason “to deprive citizens of the United States of the general protection which on its face [the] section . . . most reasonably affords.”²²

²²*United States v. Mosley*, 238 U. S. 383, 388. And see *Bomar v. Keyes*, 162 F. 2d 136 (1947), where the Court of Appeals for the Second Circuit, confronted with a case of first impression under 8 U. S. C. 43 (the “under color of” civil section), held that it must be given the application its language indicated.

2. LEGISLATIVE HISTORY OF 47(3).

The legislative history of Section 47(3), unlike the "meager history" of 241 on which the Supreme Court relied, for want of better, in the *Classic* case (*loc. cit. supra*, note 21), is copious²³ and fully exposes the purposes of the Congress. It was uniformly asserted throughout the congressional debates and at no time doubted, that the chief purpose of Section 2 of the so-called Ku Klux Act²⁴ from which 47(3) is derived, was to provide redress against the Klansmen for their actions as private individuals;²⁵ while this was the major stimulus for the enactment, Congress also contemplated the application of the section to any individual committing the specified acts.²⁶

²³The debates cover approximately 500 pages of the Congressional Globe.

²⁴The Act of April 20, 1871, C. 22, 17 Stat. 13, the first section of which has become 8 U. S. C. 43, and the second section 8 U. S. C. 47(2) and 47(3), is generally so called. See *Screws v. United States*, 325 U. S. 91 at 99.

²⁵It is indisputably clear from the congressional descriptions and discussions of the Ku Klux that the Klansmen were deemed to be acting only as private individuals. (*Cong. Globe*, pp. 320-321, 336-7, 339, 357, 394, 601-607.)

²⁶As a matter of statutory construction, the section would in any event be so applied. While the legislative purpose shows the connotation to be ascribed to the statutory terms, the application of the statute is not, of course, limited to the specific offense Congress had before it.

Thus, in *United States v. Mosley*, 238 U. S. 383, in which the Court by Mr. Justice Holmes construed Section 241, it pointed out that "The source of this section in the doings of the Ku Klux and the like is obvious . . . [But the] section . . . had a general scope and used general words that have become the most important now that the Ku Klux has passed away." Similarly, in *United States v. Classic*, 313 U. S. 299, 314, the Court said: "It is no extension of the criminal statute . . . to find a violation of it in a new method of interference with the right which its words protect."

In the debates both the proponents and opponents of the Act at all times recognized its application to private individuals. Thus, the major points of attack by the Act's opponents were its alleged unconstitutionality because of its application to private individuals rather than merely to State agents, and its alleged supersession of State law with respect to the offenses of all private individuals;²⁷ spokesmen for the statute, at all times conceding that it applied to private individuals, urged that it was nevertheless constitutional because of the power of Congress under the original Constitution directly to protect the rights of citizens and that it was concerned with individual crimes only insofar as they affected Federal rights.²⁸

²⁷Cong. Globe, pp. 337-338, 351-353, 357, 361, 366, 376-7, 385, 396, 416, 419, 420, 429-430, 455, Appendix p. 215.

²⁸Cong. Globe, pp. 382, 478, and Appendix p. 69 (Speeches by Representative Shellabarger, Chairman of Select House Committee which drafted the statute); pp. 475-476 (speech of Representative Dawes, a member of the Committee); pp. 332, 382-3 (Representative Hawley), 485, 580, Appendix, p. 229.

While the more authoritative congressional view was that the statute was enacted under the original Constitution, some reference was made to the Fourteenth Amendment as a source for the legislation (Cong. Globe, pp. 367, 461, 481, 575-6, 607, 692-3). Some Congressmen regarded the statute as an implementation of the Amendment merely in the sense that the Amendment declared the paramountcy of national citizenship (see *Selective Draft Law Cases*, 245 U. S. 366, 388-9) and extended the rights of citizenship, which the statute was to protect, to all races. But even the view of those Congressmen who regarded the enactment as an exercise of the powers conferred by the Fourteenth Amendment is no indication of a view that the statute was inapplicable to private individuals, for the Amendment was originally regarded as giving Congress power to protect against private action. See Carr, *Federal Protection of Civil Rights* (1947), p. 36; Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 235; *Constitutional Basis for Federal Anti-Lynching Legislation*, 6 *Lawyers Guild Review* (1946), pp. 643, 645.

While some Congressmen emphasized one or another of the rights of citizens which would be protected by 47(3) including the right of assembly,²⁹ the dominant intent was to protect without particularization "the American citizen . . . in the enjoyment of [whatever] rights, privileges and immunities [are] secured to him under the Constitution" and whatever "privileges and immunities which are in their nature 'fundamental' . . . elements of citizenship."³⁰ Thus, there can be no doubt that redress for deprivation of the privilege involved in the instant cause of action, which has been repeatedly stated to be a fundamental privilege of citizenship (*supra*, pp. 17-20), is within the legislative intent.

Finally, the legislative history makes clear that the instant action is the very type with which Congress was deeply concerned. For the responsible spokesmen for the statute regarded it as vital to the well-being of the Republic

²⁹Cong. Globe, p. 382 (Rep. Hawley). And interference with political meetings was specifically mentioned as one of the then current abuses by the Ku Klux (Cong. Globe, p. 444).

³⁰Cong. Globe, p. 475 (Committee member Dawes); Appendix p. 69 (Chairman Shellabarger). Statements to same effect: pp. 382 (Shellabarger) 694 (Senator Edmunds, Chairman of Judiciary Committee who steered the bill through the Senate), 341, 429, 485, 568, 607.

The legislative history thus proves beyond doubt that the phrase "privileges and immunities under the laws" includes privileges and immunities under the Constitution. Such inclusion would in any event be assumed since the Constitution is customarily referred to as part of the laws of the United States. (*I. e.*, see such reference in Art. VI, Sec. 2 of the Constitution.)

that protection be thereby afforded to everyone who “by reason of popular sentiment . . . cannot obtain the rights and privileges due an American citizen.”³¹

*The District Court's Erroneous Explanation of the Term
“Equal.”*

So far as the District Court adverts to the terms of 47(3), its construction is largely based on its interpretation of the one word “equal” [R. 24-25]. Even if its view of the implications of this term were well-founded, which we submit it is not,³² it would not be justifiable because of one word to ignore all the other indications, both in language and history, that 47(3) was to apply to acts

³¹Cong. Globe, p. 429.

Such protection was to be afforded whatever the root of the prejudicial “sentiment.” Senator Edmunds explained “we do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another . . . but if . . . it should appear that this conspiracy was formed against this man because he was a Democrat . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.” (Cong. Globe, p. 567.)

³²The District Judge’s statement that one could only be deprived of “equal” privileges and immunities by the State seems completely circular reasoning because the implication of “equal” depends on the scope of the “privileges.” For a “privilege” is “the freedom to assert a legal right or a legal power” (*Bomar v. Keyes*, 162 F. 2d 136, 139 (C. A. 2d, 1947)); and whether it is the State or a private individual that is capable of depriving a citizen of his “equal” privilege depends on whether he is guaranteed to be equally free as other citizens only from interference by the State or from interference by other individuals as well. If the latter, then he is deprived of “equal” privileges by private individual action in the same way as private action by one riparian user deprives another of the “equal” privilege of using water.

Whether “equal protection of the laws,” as to which there is no established guarantee to the citizen by the Federal Government against private acts, has the connotation of State action, is not here in issue.

of private individuals.³³ But in any event, the statutory history makes it clear that the word "equal" was inserted only to signify that in order to fall within the section the conspiracy must seek to affect a citizen's enjoyment of such privileges as are being enjoyed by other citizens.³⁴

Thus, appellees' conspiracy to prevent appellant-citizens from enjoying the privilege of assembling to petition Congress and discuss national affairs, which was being enjoyed without such interference by their fellow-citizens, is squarely within the intent of the statute. The statute was to prevent any private individuals such as appellees from arrogating to themselves the power to govern whether or not citizens shall enjoy the privileges guaranteed to them by the Federal Government under the Constitution.

C. Construction of Section 47(3) as Embracing the Instant Cause of Action Is Entirely Consistent With Established Principles of Federal-State Relations.

There is no foundation for the District Court's apprehension that construction of Section 47(3) as establishing the instant cause of action would result in a broad Federal

³³See *United States v. Gaskin*, 320 U. S. 527, in which the Supreme Court reversed a District Court judgment sustaining a demurrer to an indictment under The Peonage Abolition Act. The Supreme Court refused to follow the literal reading of the Act which limited its scope and which had been adopted by the District Court. The Court held that "the compactness of phrasing and the lack of strict grammatical construction does not obscure the intent of the Act." (320 U. S. at 529.)

³⁴The insertion of the word "equal" was the result of an amendment the purpose of which, according to Chairman Shellabarger, was "to confine the authority of this law to . . . deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." (Cong. Globe, p. 478.)

right of redress against private individuals [R. 38]. For the privileges and immunities subject to direct congressional protection and thus covered by Section 47(3) under the construction here urged, are extremely few in number.³⁵

Furthermore, the circumstances that these privileges directly and vitally concern the functioning of the Federal Government and that the problem of protecting them from interference is nationwide, render Federal redress far more appropriate and effective when such privileges are attacked than resort to diverse State remedies. Obviously, for example, a State action against appellees for trespass or assault [see R. 33-34], would not tend to serve as an assertion of appellants' right to assemble to petition Congress and discuss national affairs, or as a nationwide deterrent to interferences with such rights, as does an action like the instant one which is directed specifically at the vindication of those rights. And such a vindication is not of importance solely to the plaintiff, as in the case of a State civil action; the Federal right of action was established by Congress not only for the sake of the deprived citizen but also for the sake of the "healthy organization of the government itself."³⁶

³⁵See *United States v. Wheeler*, 254 U. S. 281. And even if the privileges of citizenship guaranteed by the original Constitution are deemed to be the same as those protected by the Fourteenth Amendment (see *supra*, note 16), their range is not expanded. See *Colgate v. Harvey*, 296 U. S. 404, and *James Stewart & Co. v. Sadrakula*, 309 U. S. 94. Thus, there is no pertinence in the instant case of the view voiced in the Fourteenth Amendment cases that the guarantee of protection to life, liberty and property must be construed as a guarantee only against State action or else Federal power would extend over all personal and property rights. See Fourteenth Amendment cases, *supra*, note 8; opinion of Justice Stone in *Hague v. C.I.O.*, 307 U. S. at 520; *Snowden v. Hughes*, 312 U. S. 12.

³⁶*Yarbrough case*, *loc. cit. supra*, note 17.

Accordingly, the fact that the acts alleged in the instant complaint constitute bases for State criminal or civil actions [R. 33-34], does not detract either from the validity or importance of the instant action. Congress, recognizing that there would be such a concurrence of jurisdiction, was concerned with establishment of a means for vindication of Federal rights of citizenship, without dependence upon whether or to what extent relief was provided by State law (see legislative history, *supra*, pp. 23-24). Thus, in the instant case, appellants are not concerned with personal or property injuries for which they could recover in State suits; the significance to appellants of appellees' acts and the major ground of their prayer for damages is the deprivation which they suffered in their rights as United States citizens.

* * * * *

Thus, we submit that the requirements for a cause of action, as set forth in Section 47(3), are fully met by the allegations of the complaint. The elements of a cause of action, according to Section 47(3), are, at the outset, that "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person . . . of equal privileges . . . under the laws." Here appellees within the State of California conspired to deprive appellants of their privilege under the Constitution, which was being enjoyed by other citizens, to assemble to petition Congress and to discuss national affairs. 47(3) further prescribes that "in . . . case of [such] conspiracy . . . if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured in his person . . . or deprived of having and exercising any . . . privilege of a citizen of the United States, the party so injured or deprived may have an

action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators.” Here, in furtherance of the object of their conspiracy against appellants, appellees intimidated and shoved appellants, thus injuring them in their person, and broke up their assembly, thus depriving them of having and exercising their privileges as citizens of the United States. Appellants therefore “have an action for the recovery of damages” for such injury and deprivations.³⁷

It is incumbent upon this Court to enforce whatever rights of action are within the protection Section 47(3) reasonably affords. (*United States v. Mosley*, 238 U. S. 383, 388.) And, as the Supreme Court pointed out in the *Screws* case, it is of especial importance that full effect be given to the sections of the civil rights acts now extant, for Congress has kept them alive for more than half a century, despite repeal of the numerous other sections of the original civil rights legislation. See *Screws v. United States*, 325 U. S. at page 100. Like the criminal section involved in the *Screws* case, Section 47(3) should “be allowed to serve its great purpose—the protection of the individual in his civil liberties” (325 U. S. at p. 98). And in the preservation of civil liberties, the civil suit against private individuals is perhaps of greater significance than the criminal sanction, particularly in times of controversy and stress.³⁸

³⁷The District Court’s insertion into the statute of the requirement that there be a series of deprivations [R. 33] is entirely unwarranted; it has no support in the language or history of the statute, in the Section 241 cases, or in general doctrine. Even with respect to “equal protection of the laws,” there may be a denial “though it is neither systematic or long-continued” (*Snowden v. Hughes*, 321 U. S. 1, 9-10).

³⁸See Carr, *Federal Protection of Civil Rights* (1947), pp. 14, 60, 148-9; “*To Secure These Rights*,” Report of President’s Committee on Civil Rights (1947), pp. 117-118.

II.

Section 47(3), Construed as Embracing the Cause of Action Stated in the Instant Complaint, Is Constitutional.

It seems to be conceded in the District Court opinion that the cause of action stated in the instant complaint could constitutionally be established by Section 47(3) [R. 23-24]. That 47(3) is constitutional if construed as embracing the appellants' cause of action is too clearly established by the Supreme Court opinions to require argument. *United States v. Cruikshank*; *In re Quarles and Butler*; and see *Ex parte Yarbrough*; *Logan v. United States*; *Powe v. United States*, all *loc. cit. supra*, pp. 12-19. If, as declared in the cited cases, Congress can protect through imposing a criminal penalty such privileges as that of assembling to petition Congress and discuss national affairs, there can be no doubt that it can by Section 47(3), afford a civil remedy for their defense.

Conclusion.

The judgment of the District Court should be reversed and the District Court directed to deny appellees' motion to dismiss the complaint.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

ROBERT R. RISSMAN,

Attorneys for Appellants.

NANETTE DEMBITZ,

ARTHUR GARFIELD HAYS,

WILLIAM EGAN COLBY,

PETER H. KASKELL,

*Counsel, American Civil Liberties Union,
of Counsel.*

The first of these is the fact that the
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No. 12121

United States
Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

BENJAMIN W. McNAIR,
Appellee.

Apostles on Appeal

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED
FEB 25 1949

PAUL R. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Decree	13
Amended Findings and Conclusions.....	10
Answer	6
Appeal:	
Certificate of Clerk to Apostles on.....	23
Notice of	14
Order Extending Time for Docketing Record on	18
Order Granting Petition for.....	17
Order Transmitting Original Exhibits on....	19
Petition on	15
Praecipe for Apostles on.....	21
Statement of Points and Designation of Record on (U.S.C.A.).....	102
Stipulation Extending Time for Docketing Record on	18
Stipulation and Order Transmitting Original Exhibits on	19

	PAGE
Assignments of Error.....	16
Certificate of Clerk to Apostles on Appeal....	23
Decree, Amended	13
Decision of Court, rendered April 21, 1948....	98
Designation of Record, Statement of Points and (U.S.C.A.)	102
Docket Entries	2
Findings and Conclusions, Amended.....	10
Libel	4
Names and Addresses of Proctors.....	1
Notice of Appeal.....	14
Order Extending Time for Docketing Record	18
Order Granting Petition for Appeal.....	17
Order Transmitting Original Exhibits.....	19
Petition on Appeal.....	15
Praecipe for Apostles on Appeal.....	21
Statement of Points and Designation of Record (U.S.C.A.)	102
Stipulation Extending Time for Docketing Record	18
Stipulation and Order Transmitting Original Exhibits	19

Transcript of Testimony and Proceedings....	24
---	----

Exhibits for Libelant:

1—Certificate of Fitness.....	63
3—Letter dated October 23, 1946, from Division of Insurance, U. S. Maritime Commission to Proctors for Libelant.....	92
4—Letter dated March 25, 1947, from Division of Insurance, U. S. Maritime Commission to Proctors for Libelant.....	93

Exhibits for Respondent:

A-2—Claim of Libelant to U. S. Maritime Commission	68
A-3—Letter from Proctors for Libelant, dated Feb. 10, 1947, to Division of Insurance, U. S. Maritime Commission, enclosing Abstract of Clinical Record from Marine Hospital, Seattle.....	69

Witnesses for Libelant:

MacKay, Hunter J.

—direct	25
—cross	36
—redirect	44

McNair, Benjamin W.

—direct	46
—cross	64, 83
—redirect	89

McNair, Leo J.

—direct	94
---------------	----

Witnesses for Respondent:

Wagner, Jacob C.

—direct	72
—cross	81

NAMES AND ADDRESSES OF PROCTORS

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Seattle 4, Washington.

BASSETT & GEISNESS,

Proctors for Appellee,
811 New World Life Bldg.,
Seattle 4, Washington. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the Western
District of Washington, Northern Division

No. 15102

BENJAMIN W. McNAIR,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Cause tried before the Hon. John C. Bowen,
U. S. District Judge.

DOCKET ENTRIES

1947

Sept. 4—Filed Libel.

Sept. 12—Filed sworn return of service.

Nov. 21—Filed exceptions of Respondent, United
States of America to Libel in Personam.

Nov. 25—Filed affidavit of John Geisness in re-
sponse to exceptions.

Nov. 25—Filed notice of hearing Respondent's ex-
ceptions 12/1/47 10 a.m.

Dec. 1—Filed Memorandum of Authorities.

Dec. 1—Ent. order continuing hearing on excep-
tions one week. Briefs to be filed by Dec.
5, 1947.

Dec. 3—Filed Memorandum of Libelant.

Dec. 8—Ent. record of hearing on exceptions.
Cont. to 12/13/47 for further hearing.
Additional briefs to be filed by 12/12/47.

1947

Dec. 13—Ent. record of hearing on exceptions. Ent. order overruling exceptions. Dec. 29, 1947, 10 a.m. set for settling order and carrying out Court's ruling.

Dec. 13—Filed supplemental Memo. of Libelant.

Dec. 26—Filed Order overruling Respondent's exceptions.

1948

Mar. 1—Filed Answer of Respondent, U. S. A.

Mar. 2—Ent. order for Trial. April 20, 1948, 10 a.m.

Apr. 20—Filed Libelant's Trial Memorandum. [2]

Apr. 20—Filed Libelant's Supplemental Trial Memo.

Apr. 20—Ent. Record of Trial, Court, Exhibits.

Apr. 21—Ent. Record of Trial, Court, Exhibits.

Apr. 21—Court renders oral decision in favor of Libelant in the sum of \$1,525.00 and Costs.

Apr. 21—Ent. order setting May 3, 1948, 10 a.m. for settling Findings of Fact, Conclusions of Law and Judgment.

May 3—Filed Findings of Fact and Conclusions of Law.

May 3—Filed Statement of Costs and Disbursements to be Taxed Against Respondent, \$37.20.

May 3—Filed and Entered Decree in favor of Libelant against Respondent in the sum of \$1,550.00 together with Costs, \$37.20.

July 13—Filed Stipulation.

1948

July 13—Filed Order Vacating Findings of Fact, Conclusions of Law and Judgment and Decree.

July 13—Filed Amended Findings of Fact and Conclusions of Law.

July 13—Filed and Entered Amended Decree.

Sept. 17—Filed Defendant's Notice of Appeal.

Sept. 17—Filed Assignments of Error.

Sept. 17—Filed Petition on Appeal.

Sept. 17—Filed Order Granting Petition for Appeal.

Oct. 27—Filed Stipulation and Order extending time for filing Record on Appeal and docketing cause.

Dec. 2—Filed Court Reporter's Transcript of Proceedings.

Dec. 2—Filed Praecipe for Apostles on Appeal.

Dec. 2—Filed Stipulation and Order Transmitting Original Exhibits. [3]

[Title of District Court and Cause.]

LIBEL BY SEAMAN, WITHOUT PREPAYMENT OF COSTS, UNDER THE SUITS IN ADMIRALTY ACT TO RECOVER WAR RISK INSURANCE BENEFITS

For cause of action the libelant alleges:

I.

At all times herein mentioned the S.S. "William Sharon" was a merchant vessel operated for the United States of America by the War Shipping

Administration. On December 28, 1944 libelant was employed as a fireman and water-tender aboard said vessel pursuant to engagement under articles and was at all times herein mentioned an insured under the Second Seamen's War Risk Policy established by Maritime War Emergency Board decision I-a, as amended and supplemented.

II.

On said date, while libelant was in the course of said employment and while said vessel was at Mindoro, Philippine Islands, said vessel was struck by Japanese military planes carrying bombs and libelant was struck in his right shoulder near the base of his neck by a metal fragment from one of said exploding bombs and as a direct and proximate result of said injury libelant has been at all times since said injury and always will be continuously and totally disabled from performing any and every kind of duty pertaining to said occupation in which he was engaged at the time of said injury. [4]

III.

Libelant and the United States Maritime Commission, through its duly authorized division of insurance, are in disagreement as to libelant's right to benefits under the Second Seamen's War Risk Policy, as amended, by virtue of said injuries sustained by him.

IV.

Libelant now elects to receive \$5,000.00 in a lump sum but has not heretofore made such an election.

V.

All and singular the premises are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant claims the sum of \$5,000.00 and further prays for such other and different relief as to the court may appear just and proper.

BASSETT and GEISNESS,
JOHN GEISNESS,
Proctors for Libelant.

(Duly Verified.)

[Endorsed]: Filed Sept. 4, 1947.

[5]

[Title of District Court and Cause.]

ANSWER

Comes Now the respondent, United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney for said District, and for answer to the Libel in Personam herein, admits, denies and alleges as follows:

I.

Answering paragraph I of the libel herein, respondent admits the allegations thereof.

II.

Answering paragraph II of the libel herein, respondent admits that the S.S. William Sharon was attacked by Japanese military planes on December 28, 1944.

Further answering said paragraph, respondent alleges it does not have sufficient information on which to form a belief as to whether or not libelant received any injuries as a result of the attack of said vessel by enemy planes and therefore denies each and all of the allegations relating thereto.

Further answering said paragraph, respondent denies libelant has been and will be totally and continuously disabled from performing any and every kind of duty pertaining to the occupation in which he was engaged at the [6] time of the said injury.

III.

Answering paragraph III of the libel herein, respondent denies the allegations thereof except as hereinafter admitted.

Further answering said paragraph, respondent alleges that on or about September 6, 1946, libelant filed a claim with the United States Maritime Commissioner, successor to the War Shipping Administration; that thereafter by letter of October 23, 1946, the said agency requested further information relative to libelant's condition; that by letter dated February 10, 1947, the libelant furnished additional information, which letter the Maritime Commission answered by letter dated March 25, 1947; that copies of all of the aforesaid correspondence are in the possession of libelant.

IV.

Answering paragraph IV of the libel herein, respondent admits the allegations thereof and alleges that the terms and conditions of the Second

Seamans Policy of War Risk insurance are determinative of libelant's right to make an election.

V.

Respondent denies each and every allegation of paragraph V of the libel herein.

Further Answering the said libel, and as a separate defense thereto, respondent alleges as follows:

I.

That on December 28, 1944, libelant was a member of the crew of the S.S. William Sharon, a merchant vessel operated for the United States of America, by the War Shipping Administration. That on said date there was in full force and [7] effect for the benefit of libelant, the Second Seaman's War Risk policy.

II.

That on December 28, 1944, the said S.S. William Sharon was attacked by Japanese military planes and disabled and some of the members of the crew aboard the said vessel were injured. That respondent does not now have sufficient information upon which to form a belief as to whether or not libelant herein received any injuries as a result of the attack of said vessel by enemy planes.

III.

That subsequent to the enemy attack on the S.S. William Sharon, the libelant was repatriated aboard the S.S. David Hewes, arriving in the United States at San Francisco, California on March 2, 1945.

IV.

That libelant herein did not file a claim on account of alleged injuries or disability with the United States Maritime Commission, successor to the War Shipping Administration until September 6, 1946.

V.

That the action herein was filed on September 4, 1947 and served on the United States Attorney on said date.

VI.

That the said action was not timely commenced and is barred.

VII.

That the libelant did not file a claim for disability within the time required by the provisions of said policy of insurance and said action herein is barred. [8]

Wherefore, respondent prays that the libel may be dismissed with costs and for such other and further relief as may be just.

J. CHARLES DENNIS,
United States Attorney.
FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed March 1, 1948.

[9]

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came regularly before the court on Tuesday, the 20th day of April, 1948, the libelant being present in person and represented by John Geisness of Bassett & Geisness, his proctors, and respondent being represented by J. Chas. Dennis and Frank Pellegrini, its proctors, and the court having considered the records and files herein, evidence adduced by and on behalf of the respective parties and the stipulations and arguments of counsel, and being fully advised in the premises, now makes the following

FINDINGS OF FACT

I.

At all times herein mentioned the S.S. "William Sharon" was a merchant vessel operated for the United States of America by the War Shipping Administration. On December 28, 1944 libelant was employed as a fireman and water-tender aboard said vessel pursuant to engagement under articles and was at all times herein mentioned an insured under the Second Seamen's War Risk Policy established by Maritime War Emergency Board decision 1-a, as amended and supplemented. Libelant is now twenty-one years of age.

II.

On said date, while libelant was in the course of said [10] employment and while said vessel was

at Mindoro, Philippine Islands, said vessel was struck by Japanese military planes carrying bombs and libelant was struck in his right shoulder by a metal fragment from one of said exploding bombs and as a direct and proximate result of said injury libelant was continuously and totally disabled from performing any and every kind of duty pertaining to said occupation in which he was engaged at the time of said injury for a period of one year from and after March 2, 1945, the first date upon which libelant arrived in the continental United States following said injury.

Libelant filed with the United States Maritime Commission between October 9, 1946 and October 23, 1946 a claim for benefits under said Second Seamen's War Risk Policy by reason of the above-mentioned injury and disability. Said Maritime Commission thereupon requested further information, including medical findings, and, after receiving such further information, said Commission, by letter dated March 25, 1947, rejected said claim on the merits but invited a further application for consideration should libelant have further periods of disability. No objection was ever made by said Commission to the timeliness of said claim until respondent filed exceptions in the above entitled cause.

IV.

As a direct and proximate result of said injuries, libelant has been and is permanently and partially disabled to an extent equal to 10% of the amputation of his right arm at the shoulder.

V.

All and singular the premises are true and within the admiralty jurisdiction of the United States and of this Court.

From the foregoing Findings of Fact the Court makes the following [11]

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties to and subject matter of this action.

II.

Libelant is entitled to recover the sum of \$1,800.00 for said disability during said period of one year from and after March 2, 1945 and the additional sum of \$325.00 for said permanent partial disability, besides libelant's costs of suit.

Done In Open Court this 13th day of July, 1948.

JOHN C. BOWEN,
Judge.

Presented by:

JOHN GEISNESS,
Of Proctors for Libelant.

Approved as to form:

FRANK PELLEGRINI,
Of Proctors for Respondent.

In the District Court of the United States for the
Western District of Washington, Northern Division

In Admiralty—No. 15102

BENJAMIN W. McNAIR,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMENDED DECREE

The above cause came regularly before the court upon stipulation of libelant and respondent, through their respective proctors, from and by which it appears that the decree made and entered in said cause May 3, 1948 should be changed and that an amended decree should be entered, and it is now, therefore,

Ordered, Adjudged and Decreed that libelant have and recover of and from the respondent United States of America the sum of \$2,125.00, together with his costs of suit hereby taxed in the sum of \$37.20.

Done In Open Court this 13th day of July, 1948.

JOHN C. BOWEN,

Judge.

Presented by:

JOHN GEISNESS,

Of Proctors for Libelant.

Approved as to form:

FRANK PELLEGRINI,

Of Proctors for Respondent.

[Endorsed]: Filed July 13, 1948.

[13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Benjamin W. McNair, libelant, and Bassett & Geisness and John Geisness, his proctors; and to The Honorable John C. Bowen, Judge, and Millard P. Thomas, Clerk of the above entitled Court:

You and each of you will please take notice that the United States of America, respondent in the above entitled cause, hereby appeals from that certain Amended Judgment and Decree entered on the 13th day of July, 1948, in the above entitled cause, wherein the Court ordered, adjudged and decreed that the libelant recover judgment against the United States of America in the sum of \$2,125.00, together with his costs of suit taxed in the sum of \$37.20, hereby appealing from the whole of the said decree and particularly each and every part thereof granting to the libelant a recovery on account of the allowance of disability payments on the said Second Seamen's War Risk Policy of insurance from and including August 13, 1945 to March 2, 1946, unto the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of August, 1948.

FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 17, 1948.

[14]

[Title of District Court and Cause.]

PETITION ON APPEAL

To The Honorable Judges of the Above Entitled Court:

Comes now the United States of America, respondent in the above entitled cause, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney for said District, and being aggrieved by that certain final order, to-wit: the amended judgment and decree signed, filed and entered in the above cause on July 13, 1948, hereby claims an appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that such appeal may be allowed forthwith by order of the above entitled Court without issuance of citation upon said respondent's notice of appeal and assignments of error heretofore filed and duly presented herewith.

Dated this 20th day of August, 1948.

J. CHARLES DENNIS,
United States Attorney.
FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 17, 1948.

[15]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent, United States of America, hereby respectfully assigns error in the proceedings before the Court and in the Amended Judgment and Decree entered and filed on the 13th day of July, 1948, as follows:

1. That the Court erred in awarding to libelant on the Second Seamen's War Risk Policy of insurance, a recovery in the total sum of \$2,125.00.

2. That the Court erred in allowing the libelant to recover disability payments on the said Second Seamen's War Risk Policy of insurance for period from and including August 13, 1945 to March 2, 1946.

3. That the Court erred in allowing the plaintiff any recovery whatsoever in excess of \$1,140.00 on said Second Seamen's War Risk Policy of insurance.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 17, 1948.

[16]

[Title of District Court and Cause.]

ORDER GRANTING PETITION
FOR APPEAL

The above entitled cause having duly and regularly come on for hearing before the above entitled Court, the undersigned Judge presiding upon petition for appeal of respondent, United States of America, presented to this Court with said respondent's notice of appeal and assignments of error heretofore filed this day, and the Court having considered the same, now, therefore, it is hereby

Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Amended Judgment and Decree heretofore entered and filed on the 13th day of July, 1948, be and the same is hereby allowed.

Done In Open Court this 17th day of September, 1948.

JOHN C. BOWEN,
United States District Judge.

Presented by:

FRANK PELLEGRINI,
Assistant United States Attorney.

Notice of presentation of the within and foregoing order is hereby waived.

BASSETT & GEISNESS,
By /s/ DUANE VANCE,
Proctors for Libellant.

[Endorsed]: Filed Sept. 17, 1948.

[17]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the appellant and appellee in the above entitled cause that the time allowed appellant for filing the record on appeal and for docketing said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and it is hereby extended to and including the 15th day of December, 1948.

/s/ BASSETT & GEISNESS,
By /s/ JOHN GEISNESS,
Attorneys for Appellee.

J. CHARLES DENNIS,
United States Attorney.
FRANK PELLEGRINI,
Assistant United States Attorney, Attorneys for
Appellant, United States of America.

[Endorsed]: Filed Oct. 27, 1948.

[18]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING CAUSE

It appearing to the Court that the parties hereto have stipulated to extend appellant's time for filing the record and docketing said cause in the United States Circuit Court of Appeals for the Ninth Circuit, now, therefore it is hereby

Ordered that the time to be allowed appellant for the filing of the record and the docketing of

said cause to the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended to and including December 15, 1948.

Done In Open Court this 27th day of October, 1948.

/s/ JOHN C. BOWEN,
United States District Judge.

Notice of presentation waived:

/s/ JOHN GEISNESS,
Attorney for Appellee.

Presented by:

FRANK PELLEGRINI,
Assistant United States Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 27, 1948. [19]

[Title of District Court and Cause.]

STIPULATION AND ORDER TRANSMIT-
TING ORIGINAL EXHIBITS

It Is Hereby Stipulated and Agreed by and between the parties hereto through their proctors of record undersigned that the following original exhibits may be transmitted by the Clerk of the above Court to the United States Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal:

Libelant's Exhibit 1, Certificate of Fitness;

Libelant's Exhibit 3, Letter dated October 23, 1946 from Division of Insurance, U. S. Maritime Commission to proctors for libelant;

Libelant's Exhibit 4, Letter dated March 25, 1947, from Division of Insurance, U. S. Maritime Commission to proctors for libelant.

Respondent's Exhibit A-1, X-ray;

Respondent's Exhibit A-2, Libelant's claim to U. S. Maritime Commission;

Respondent's Exhibit A-3, Letter from proctors for libelant, dated February 10, 1947, to Division of Insurance, U. S. Maritime Commission enclosing abstract of clinical record from Marine Hospital, Seattle;

Respondent's Exhibit A-4, Hospital Records, Marine Hospital, Seattle.

Dated at Seattle, Washington this 29th day of November, 1948.

/s/ BASSETT & GEISNESS,
Proctors for Libelant.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

It is so Ordered.

Done In Open Court this 2nd day of December, 1948.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed Dec. 2, 1948.

[20]

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the Above Entitled Court:

Utilizing the Transcript of the Record filed herewith, you are hereby requested to prepare in the above entitled cause Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, supplementing and comparing the transcript to the extent necessary to make index, and certify full, true and complete Apostles on Appeal as required by the Admiralty Rules of that Court containing the following:

1. Caption showing proper style of the Court and showing title and number of the cause.

2. Introductory statement showing time of commencement of the cause, names of all parties, names and addresses of all proctors, dates of filing of various pleadings, name of trial Judge, date of trial, date of final decree, date when Notice of Appeal filed and date of Order allowing appeal.

3. The Libel.

4. Respondent's Answer.

5. All testimony of all witnesses taken in open court with all exhibits in connection with such testimony including the following exhibits:

(a) Libelant's Exhibit 1—Certificate of Fitness.

(b) Libelant's Exhibit 3—Letter dated October 23, 1946 from Division of Insurance, U. S. Maritime Commission to proctors for libelant. [21]

(c) Libelant's Exhibit 4—Letter dated March 25, 1947, from Division of Insurance, U. S. Maritime Commission, to proctors for libelant.

(d) Respondent's Exhibit A-1—X-ray.

(e) Respondent's Exhibit A-2—Libelant's claim to U. S. Maritime Commission.

(f) Respondent's Exhibit A-3 — Letter from proctors for libelant, dated February 10, 1947, to Division of Insurance, U. S. Maritime Commission, enclosing abstract of clinical record from Marine Hospital, Seattle.

(g) Respondent's Exhibit A-4 — Hospital Records, Marine Hospital, Seattle.

6. Court's Decision rendered April 21, 1948.

7. Amended Findings of Fact and Conclusions of Law entered and filed July 13, 1948.

8. Amended Judgment and Decree entered and filed July 13, 1948.

9. All notices, motions and orders relating to the appeal, including the following:

(a) Notice of Appeal.

(b) Petition on Appeal

(c) Assignments of Error.

(d) Order granting petition for appeal entered and filed September 17, 1948.

(e) Stipulation Extending Time for Filing Record and for Docketing Cause in the Circuit Court.

(f) Order Extending Time for Filing Record on Appeal and Docketing Cause, entered on October 27, 1948.

10. Stipulation and Order Transmitting Original Exhibits.

11. This Praecipe.

J. CHARLES DENNIS,

United States Attorney.

FRANK PELLEGRINI,

Assistant U. S. Attorney. [22]

(Acknowledgment of Service.)

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 23, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the Reporter's Transcript of Proceedings, the original of which is sent up as a part of the record on appeal, and the original exhibits, constitute the apostles on appeal from the Amended Decree of the United States District Court for the Western District of Washington, at Seattle, filed and entered July 13, 1948, to the United States Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparing apostles on appeal herein, to-wit: [24]

Twenty-two pages at 10 cents (copies furnished), \$2.20; petition for appeal, \$5.00; total \$7.20.

I further certify that the costs of this record on appeal have not been paid to me for the reason

that said appeal is being prosecuted by the United States of America.

I further certify that no citation on appeal has been issued in said cause.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 7th day of December, 1948.

(Seal) MILLARD P. THOMAS,
Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division

In Admiralty—No. 15102

BENJAMIN W. McNAIR,

Libellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Before: The Honorable John C. Bowen, District Judge.

Seattle, Washington

April 20, 1948—10:00 o'clock a.m.

Appearances: John Geisness, Esq., (Bassett & Geisness), appearing for libellant; J. Charles Dennis, Esq., United States Attorney, and Frank Pellegrini, Esq., Assistant United States Attorney, appearing for respondent. [1 *]

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

PROCEEDINGS

The Court: Are counsel and the parties ready to proceed with the trial of the case of Benjamin W. McNair versus United States of America?

Mr. Geisness: The libelant is ready, if the Court please, although I would like a few minutes to refresh my recollection as to some dates.

Mr. Pellegrini: The respondent is ready, if your Honor please.

(Short recess.)

The Court: You may proceed in the case on trial with the opening statement of libelant.

(Opening statements made on behalf of libelant and respondent respectively.)

The Court: Call the libelant's first witness.

Mr. Geisness: May I call a medical witness first, if your Honor please, a little out of order?

The Court: Yes.

Mr. Geisness: Dr. Mackay. [2]

HUNTER J. MACKAY,

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisness:

Q. Will you state your name, please?

A. Hunter J. Mackay.

Q. What is your occupation?

A. Practicing neuro-surgeon.

(Testimony of Hunter J. Mackay.)

Q. Where? A. City of Seattle.

Q. Are you licensed to practice as a physician in the city of Seattle and the State of Washington?

A. Yes.

Q. For how long have you been so licensed?

A. Since 1938.

Q. Prior to that time did you engage in the practice of your profession? A. Yes.

Q. Where? A. As an interne. [3]

Q. Where did you take your academic work?

A. Western Reserve University, Cleveland, Ohio.

Q. At medical college?

A. At the Medical School there, yes.

Q. Following that, did you serve an interneship, as I understand?

A. Yes. I had an interneship, and five years thereafter training in neuro-surgery.

Q. Where did you serve that interneship?

A. A year of that was in graduate school; a year of that was with Dr. Paul G. Flothow; and three years at the Mayo Clinic.

Q. Have you had any special training for the field in which you work other than that which you have already indicated?

A. Nothing except the type of experience we had in the war with traumatic injuries; that was of this nature.

Q. On August 15th, 1947, did you see and examine Benjamin W. McNair?

A. Yes, I did.

(Testimony of Hunter J. Mackay.)

Q. Where did you see him?

A. At my office on Marion Street.

Q. Here in Seattle, of course? A. Yes.

Q. Did you obtain from him a history?

A. Yes, I did.

Q. And a statement of his complaints?

A. Yes.

Q. Did you also make a physical examination?

A. Yes, I did.

Q. And an X-ray examination? A. Yes.

Q. Would you tell us what your complete examination disclosed concerning Mr. McNair's condition—his history of his complaints and the physical findings?

A. His history was essentially that as previously related to the Court, that he had been injured in the latter part of December, '44, had been returned to the States; that in the interim he had for a period of weeks been unable to use his arm, that it was numb; and that for some few weeks following its injury he thereafter began to enjoy some return of function, both motor and sensory function; that during this time he developed a pain in and about the site of the entrance of the shrapnel, and that this was particularly aggravated in any type of strain such as lifting, pulling and so on.

Q. Where was that site? [5]

A. Just above the collar bone on the right side at the base of the neck, at the root of the neck.

Q. What did your physical examination disclose?

(Testimony of Hunter J. Mackay.)

A. The neurologic findings at that time were consistent with an incomplete and a partial injury to the nerves and the arm—the brachial plexus, in other words. It showed that the reflexes through certain muscle groups were diminished appreciably and that he had a patchy type of loss of sensation throughout the upper extremity.

Q. Was there any change in the muscles of the right arm or shoulder?

A. The extensory of the forearm—the triceps muscle—that is the one on the posterior of the dorsal aspect of the arm. The extent of that was definitely diminished and its reflex was virtually absent.

Q. You spoke of the brachial plexus. Can you tell us more exactly what that is?

A. The brachial plexus is this mass of cords over the neck that runs down to the first rib under your arm. It consists of a number of nerve roots from a portion of the spinal cord into the neck region. These join together in various complex ramifications to enervate various muscles and portions of the skin in the upper extremity. [6]

Q. What do the X-rays disclose?

A. The X-rays showed a small metallic fragment in the region of the first rib on the right side, either just within the chest or just above the first rib; we couldn't be sure.

Q. Could you tell from the X-ray whether that metallic fragment was affecting the brachial plexus?

(Testimony of Hunter J. Mackay.)

A. From the point of entrance and from its final residing place, by inference it would of necessity have had to pass through some of the ramifications of the brachial plexus, yes.

The Court: Will you state again where the brachial plexus is?

The Witness: The brachial plexus is in the side of the neck—these cords in the side of the neck.

The Court: Both sides of the neck?

The Witness: Yes. There is a plexus on either side.

The Court: What is the plexus as related to the nerves?

The Witness: It is a term we use—

The Court: It is not the gangalia, is it?

The Witness: No, sir. Those are the long spinal cord. This is merely a term we [7] use to mean a complex joining together of various nerve trunks.

The Court: Is it the place where they all come together?

The Witness: Yes—

The Court: It is the junction point?

The Witness: It is the junction point.

The Court: Is that what you mean by plexus?

The Witness: By plexus; and then it again ramifies down the arm.

The Court: I am trying to get the concept of plexia.

Does it mean the function of the coming together of a lot of different nerves of different systems or does it mean something else?

(Testimony of Hunter J. Mackay.)

The Witness: Any time we have a junction of nerves that again break up into other branches, we term that a plexus.

The Court: It is not only coming together but it is also the branching out again?

The Witness: Yes; correct. Yes, sir.

The Court: A plexia of nerves or of a certain system of nerves means systems or branches [8] or trees of nerves which are held together in the middle by some central joining system?

The Witness: Yes. I think that would be a good description.

The Court: You may proceed.

Q. (By Mr. Geisness): What were your conclusions as to his condition at that time as to the prognosis and recommended treatment?

A. My opinion at that time was that he had sustained a definite injury to his brachial plexus, that he had fortunately had appreciable improvement; this in view that there was no definitive treatment indicated at the present time either for the brachial plexus injury or removal of the shrapnel, but that at some future date there was a definite possibility that the condition might regress—might become worse.

Q. Would that be the direct result of the fragment of shrapnel or of some other conditions that had resulted from the entrance of the shrapnel?

A. It is more or less a direct result—you might say indirect in that light regression is usually due

(Testimony of Hunter J. Mackay.)

to the contraction of scar tissue along the path of the missile as it entered the body. [9]

Q. At that time, that is in August, 1947, wasn't Mr. McNair handicapped for physical labor by reason of the conditions you found?

A. Yes, at that time he was; he was handicapped.

Q. In what way would that handicap be evidenced?

A. It was evidenced particularly in any maneuver that caused him to strain the muscles of the right shoulder or the right arm—the entire right upper extremity for that matter—duplicated the pain of which he complained previously.

Q. What would be the effect of engaging in activity that resulted in such strain—as of that time, now, I am speaking—in August, 1947?

A. Well, it is rather difficult to surmise any definite organic change other than the mental suffering that he would put up with in the process.

Q. Due to that pain? A. Yes.

Q. At that time was there any impairment of strength in the arm?

A. Yes. There was a slight diminution of strength in the entire right upper extremity.

Q. Would this condition—as it was at the time we have in mind—affect the dexterity with which [10] McNair might use his arm and hand?

A. Yes. Any time there is impairment of the motor function of a part, the dexterity is impaired.

(Testimony of Hunter J. Mackay.)

Q. Would you consider at that time that McNair was able to do such work as, let's say, handling cargo on a ship?

A. It would be difficult—

The Court: What date are you now speaking of?

Mr. Geisness: August 15th, 1947.

A. (Continuing): As I saw him at that time, I generally felt that it would have had to have been done with extreme difficulty if he had tried—attempted.

Q. (By Mr. Geisness): Do you feel you are sufficiently familiar with engine room work on a ship as to give us any idea as to whether he would have been handicapped at that time in the performance of his work?

Mr. Pellegrini: If the Court please, I would like to have the doctor state whether or not he was able to perform his work.

The Court: Sustained. [11]

Q. (By Mr. Geisness): Would it be your opinion that as of that time Mr. McNair was able to engage in heavy manual labor?

A. As I previously indicated, he would have to do so with extreme difficulty and suffering.

Q. Have you seen McNair since August, 1947?

A. Yes; on one occasion.

Q. I think you have already indicated that in August, 1947, you did not feel that any treatment was to be recommended? A. Yes.

Q. Is that correct? A. Yes.

(Testimony of Hunter J. Mackay.)

Q. But rather than you should wait and see what might develop? A. Yes.

Q. At that time, in your opinion, was there a possibility that the condition would improve?

A. Yes.

Q. And also a possibility that it might get worse and regress? A. Yes.

The Court: What date was that?

Mr. Geisness: August 15th, 1947. [12]

Q. (By Mr. Geisness): When did you see him again? A. I saw McNair this morning.

Q. In your office? A. Yes.

Q. Did you examine him this morning?

A. Yes, I did.

Q. What did you find this morning as to his present condition?

A. I found that at the present time, from an objective standpoint — from my standpoint that there has been appreciable improvement in his condition; that whereas the specified reflexes and weakness that had appeared before are now virtually absent, that the meat or power has returned. There is no evidence of muscle shrinkage. He also had some impairment of sensation, which is also much improved.

Q. You spoke of the effect of the condition on his reflexes in August, 1947. Is that something that can be objectively determined? A. Yes.

Q. How about the condition of the muscles which you found in August, 1947—is that something that you can objectively determine or was it just his own statement as to capacity? [13]

(Testimony of Hunter J. Mackay.)

A. No. You can get a fair opinion of a muscle's function as to certain muscle tests—as to whether there is muscle atrophy.

The Court: Was his muscle shrinkage much this morning?

The Witness: No, sir.

Q. (By Mr. Geisness): Was it in August, 1947?

A. No. There was a very slight degree of muscle atrophy.

The Court: That was what in August, 1947?

The Witness: Very slight of the triceps muscle on the right side.

Q. (By Mr. Geisness): At the present time do you think that McNair could engage in hard manual work with his right arm?

A. From an objective standpoint, he could, yes.

Q. Do you mean to intimate that from a subjective standpoint there might be a problem?

A. Yes.

Q. What would that be?

A. The pain that movement and exertion causes him, which of course I have no way of ascertaining. [14]

The Court: You can't measure that?

The Witness: No.

Q. (By Mr. Geisness): Did he complain this morning of pain to you?

A. Yes. He stated he was still suffering the same pain on exertion.

Q. In your opinion is there any permanent partial disability of that arm from the wound he sustained?

(Testimony of Hunter J. Mackay.)

A. He probably will have some permanent partial disability, yes.

Q. Could you measure that in some way?

A. It would be not over 10 per cent, as compared to an amputation at the shoulder.

The Court: He has 10 per cent loss of function or what?

The Witness: Ten per cent disability.

The Court: Ten per cent disability of what—of the shoulder or the muscles at the shoulder, or what?

The Witness: As compared to an amputation of the part at the shoulder.

The Court: What is it that has become disabled to the extent of 10 per cent below normal? [15]

The Witness: Principally the subjective side of this thing, your Honor—the pain which he experiences when he exerts himself in lifting. Function in general of his right upper extremity. In other words, we feel that if he attempts to use that arm for ordinary use in heavy labor, that 10 per cent of its function will be gone.

The Court: The normal function of which arm?

The Witness: The right arm.

The Court: You may inquire.

Q. (By Mr. Geisness): Is that a 10 per cent disability as compared with amputation of the right arm at the shoulder?

A. Yes. We usually determine it in that fashion.

Mr. Geisness: That is all.

(Testimony of Hunter J. Mackay.)

Cross Examination

By Mr. Pellegrini:

Q. Doctor, that 10 per cent disability is a figure that you arrive at based entirely upon complaints made by Mr. McNair, isn't that correct?

A. Yes. [16]

Q. It is not based upon anything that you can find medically from an objective standpoint is it?

A. That is right.

Q. In other words, from a medical standpoint the muscles of Mr. McNair's right arm at the present time are normal in all respects, are they not?

A. Yes.

Q. So that when you say 10 per cent, you base it entirely on the fact that he tells you that he suffers some pain, is that right?

A. That is correct.

Q. Doctor, what is Mr. McNair doing at the present time in the way of work, do you know, sir?

A. I don't know the specific type work. I do know that he has been handling some type of employment in a machine shop or a shop of some similar nature.

Q. He is working around a garage, is he not?

A. Something like that.

Q. Doing mechanical work?

A. He said he was helping his father, I believe.

Q. Did you have occasion to examine his hands, to determine whether or not he had calluses?

A. Yes. We looked at his hands.

Q. And he had calluses on both the right and the left [17] hand, does he not?

(Testimony of Hunter J. Mackay.)

A. Obviously he has been using the right hand, yes.

Q. Judging from the looks of his hands, he has been using the right hand as much as he has the left hand, has he not?

A. Judging it in that fashion—using that as a criterion, you could safely say he has been using it, yes.

Q. Doctor, you stated that you found a slight muscular impairment on August 15th, 1947 with regard to the muscles of his upper arm.

What muscle was that?

A. That was the extensory of the forearm, the triceps muscle.

Q. The triceps muscle? A. Yes.

Q. And just how slight was the muscular impairment, or how great?

A. Again, that is a personal opinion. As I recall, he probably had lost, we will say, 50 per cent of its function at that time. The reflex was virtually absent.

Q. Was the muscle atrophied?

A. No. I have the impression that it was in the process of atrophy. It was not marked, however.

Q. Well, there was no marked atrophy of the muscle whatever then, was there? A. No.

Q. So that when you base your opinion that there was some muscular impairment upon the fact that you thought perhaps it was atrophied, is that it?

(Testimony of Hunter J. Mackay.)

A. No. The fact mainly that his reflex was virtually absent and that it was, as far as we could tell, by our muscle-testing maneuvers—that it was weak.

The Court: And that date was August 15th, 1947?

The Witness: Yes, sir.

Q. (By Mr. Pellegrini): On that date, Doctor, he hadn't had any particular impairment of the use of that arm, had he except what he complained of subjectively?

A. Would you state that again, please, sir?

Q. I say on that date he never had any real impairment of the use of the arm except what he complained of subjectively, isn't that what you mean, sir?

A. That I can't answer for you. That is the first time I saw him. I accept his story that he had been unable to use the arm. While in the [19] office on the occasions that I had to watch him he obviously did not use it at that time as much as he did the left side.

Q. To what extent was he unable to use it from an objective standpoint, Doctor?

A. From an objective standpoint at that time I would say in the neighborhood of 40 per cent to 50 per cent disability.

Q. That is in the lifting processes only, isn't that correct?

A. Any type of work that would require the use of the upper arm, yes—lifting, pushing, pulling.

(Testimony of Hunter J. Mackay.)

Q. The use of his arm was not impaired for the purpose of turning valves on and off, was it—he could use his arm and hand for that purpose, could he not?

A. Well, of course, there are a lot of variables in a thing like that. It depends upon the size of the valves and so on.

Q. Say an ordinary valve, a 3-inch valve.

A. I am sorry; you are not speaking my language. I don't know what a 3-inch valve is.

Q. Well, the fact is, Doctor, when you say he had loss of use of the arm, it was only loss of use of the arm based entirely on his lifting processes—his use of the arm for lifting, isn't that correct?

A. Yes, heavy types of work.

Q. And that would be excessively heavy types of work, isn't that right, sir?

A. Well, it is a relative statement—yes.

Q. Well, could he carry a chair around?

A. Yes.

Q. Could he carry a 50-pound sack around?

A. With the use of his good extremity, yes.

Q. Well, I mean he would have to use both hands anyway, would he not? A. Yes.

Q. Could he handle tools?

A. Certain types of tools, yes.

Q. Well, what types of tools couldn't he handle?

A. He would find difficulty in using wrenches, for example.

Q. He couldn't handle those?

A. It would be difficult.

Q. Large, for instance, or small wrenches?

(Testimony of Hunter J. Mackay.)

A. Large ones.

Q. He could handle ordinary-sized wrenches, could he not? A. Yes.

Q. When you talk about large wrenches, you mean these [21] big long heavy Stilsson wrenches, is that right?

A. I was referring particularly to the types that pipefitters use and so on.

Q. I see. Doctor, there is a piece of shrapnel imbedded just below the right clavicle, is there not?

A. Yes.

Q. You don't believe that that should be taken out, do you, Doctor? A. No.

Q. You don't believe that its presence there in anyway incapacitates Mr. McNair?

A. No, that is right.

Q. In other words, the mere fact that there is a small piece of shrapnel doesn't hurt him at all, is that correct, sir? A. That is correct.

The Court: Where is that piece of shrapnel?

The Witness: It is just above the first rib on the right side.

The Court: Is it imbedded in the bone or is it floating around in the flesh?

The Witness: It is in the soft tissue [22] above the first rib.

Q. (By Mr. Pellegrini): There is no treatment indicated for removing it, is there, Doctor?

A. No, sir.

Q. It is not uncommon for persons to carry small foreign bodies, such as a piece of shrapnel, such as Mr. McNair has, is it?

(Testimony of Hunter J. Mackay.)

A. That is right.

Q. They are generally allowed, are they not, under good medical practice, to remain in the body at the point where they are? A. Yes.

Q. And you wouldn't want to remove this, would you? A. No, I wouldn't.

The Court: Above what rib is that shrapnel?

The Witness: The first rib, your Honor.

The Court: That is at the top.

The Witness: Yes, sir.

The Court: How would you go about removing this shrapnel, if you did; would you cut the clavicle away in order to do that?

The Witness: No, sir. Through a small incision above the clavicle.

The Court: Is there any question of the [23] clavicle having to come out if that piece of shrapnel was to be taken away surgically?

The Witness: No, sir.

The Court: There is nothing wrong with the right clavicle, then, is there?

The Witness: No, sir.

(X-ray marked as Respondent's Exhibit A-1 for identification.)

The Court: The right clavicle in its functioning is not interfered with by the presence of the shrapnel, is it?

The Witness: No, sir.

Q. (By Mr. Pellegrini): Doctor, I hand you Respondent's Exhibit A-1 which purports to be an X-ray taken of Mr. McNair at the Marine Hospital.

(Testimony of Hunter J. Mackay.)

Would you examine it and see if you can locate the piece of shrapnel which is shown in that X-ray?

A. Yes. It is visible here.

Q. Will you show it to the court?

A. This little triangular, irregular piece of shrapnel in this position here (indicating on X-ray).

Q. That piece of shrapnel imbedded where it is, in its [24] position in the soft tissues, does not in anywise impair Mr. McNair physically, does it, Doctor?

A. No.

Q. Would the fact that Mr. McNair was able to accept employment on board a vessel and actually work on the vessel indicate to you that he was able to perform duties at sea?

A. Not in itself. It indicates that he was willing to try to perform the duties.

Q. Well, if he did perform the duties, as a matter of fact, it would be some indication, would it not, Doctor, that he was able to follow his usual occupation as a seaman?

Mr. Geisness: I object to that question on the ground that it doesn't call for a medical opinion at all but for a layman's opinion.

The Court: The objection is overruled. If he knows the answer, he may give the answer.

(Last question repeated by the reporter.)

A. With a certain degree of reservation, yes. I don't feel I am in a position to answer that.

Q. (By Mr. Pellegrini): Doctor, you are generally [25] familiar with work around a garage, are you not?

A. In a vague way, yes.

(Testimony of **Hunter J. Mackay.**)

Q. And you feel that Mr. McNair's physical condition is such that he could perform that kind of labor?

A. I am not sure that I know just what you want me to—

Q. Well, if you can't answer the question, I don't want you to answer it.

A. I am not sufficiently familiar with the specific things that these fellows do in garages, I don't believe, to give you an intelligent answer to the question.

Q. You have some degree of knowledge as to the things that are done around a garage when a man works on a car, are you not?

A. Oh, yes, some of the lighter work. Handling a crankcase, of course, is another story.

Q. Do you believe Mr. McNair is able to do that kind of work?

A. In view of the complains that he has when he attempts to do that kind of work I don't think he is, no.

Q. In other words, a good deal of your opinion on August 15th, 1947 and at the present time is based entirely upon subjective complaints, is it not, [26] Doctor?

A. More so at the present time, of course, than in August.

Q. At the present time, all of it is based upon subjective complaint, is that correct, sir?

A. At the present time, yes.

(Testimony of Hunter J. Mackay.)

Q. And on August 15th, 1947 your findings were in a large part based upon subjective complaints, were they not?

A. Well, of course, findings are based upon subjective findings and that is what I had was the loss of reflexes and so on.

Q. Isn't it a fact that you arrived at your opinion based upon what McNair told you as to the pain that he had?

A. No. As I previously stated, in August of last year I thought there was sufficient objective evidence to indicate that he had a definite impairment. At the present time those signs have returned virtually to normally.

Mr. Pellegrini: That is all. [27]

Redirect Examination

By Mr. Geisness:

Q. Do you happen to remember now about how much the right triceps brachial reflex was diminished in August, 1947?

A. Somewhere between—the best I could estimate it—I think a 75 per cent to 80 per cent loss.

Q. How do you measure that?

A. We try to estimate the response of a reflex in terms of a grade of four—in other words, 25, 50, 75 per cent or 100 per cent loss or increase. It is probably accurate within five to ten per cent depending upon the examiner.

Q. Do you measure something that a man does of his own volition for you?

A. No. It is purely a reflex action when you tap the tendon with a hammer and your estimate

(Testimony of Hunter J. Mackay.)

comes from doing it enough years with enough different patients so that you eventually get the idea of about what normal is and what per cent of it is gone.

Q. I don't know what an estimate of the brachial reflex would be.

A. That is tapping a tendon in the back of the elbow, so that the arm will jerk in extensory fashion. [28]

Q. You have indicated that the brachial reflex would be that nerve group going down the arm, is that right?

A. Part of the ramification, yes.

Q. The brachial, I should say. And the right triceps would be a division of that, is that correct?

A. Yes, that is correct.

Q. What division would it be?

A. What we refer to as the posterior cord of the brachial plexus. It is branches from that division. The plexus itself divides into three major divisions.

Q. Where does it divide?

A. Up in the root of the neck, here.

Q. When you say the posterior cord, what do you mean?

A. That is the one towards the back, or in the post-dorsal position.

Q. In this case, would it be on the back of the arm?

A. Yes. It maintains its relations in approximately that fashion, down the arm.

(Testimony of Hunter J. Mackay.)

Q. So that it would really be a part of the brachial which goes down the back of the arm, to over-simplify it, is that correct?

A. Yes, that is right.

Mr. Geisness: I think that is all.

Mr. Pellegrini: No further questions. [29]

The Court: You may be excused.

(Witness excused.)

The Court: Call the next witness.

Does anyone offer this Respondent's Exhibit 1, while the doctor is here?

Mr. Geisness: I offer it. It might as well be admitted in evidence, I suppose, as long as it has been identified.

Mr. Pellegrini: I have no objection.

The Court: Admitted.

(Respondent's Exhibit A-1 received in evidence.)

BENJAMIN W. McNAIR,
the libelant, having been first duly sworn, was
examined and testified as follows:

Direct Examination

By Mr. Geisness:

Q. Will you state your full name, please? [30]

A. Benjamin W. McNair.

Q. Where do you live, Mr. McNair?

A. Redmond, Washington.

Q. How long has that been your home?

A. It has been about eleven years.

(Testimony of Benjamin W. McNair.)

Q. How old are you? A. Twenty-one.

Q. Back in December, 1944, were you going to sea? A. Yes, sir.

The Court: How old did you just say you were?

The Witness: Twenty-one, sir.

Q. (By Mr. Geisness): What ship were you on in December, 1944?

A. I was on the William S. Sharon.

Q. Is that a United States Merchant vessel?

A. Yes, sir.

Q. In what capacity were you employed aboard that ship? A. Fireman and water tender.

Q. When did you first become a member of the crew of that ship?

A. October—it was in October, sir. I don't remember the date.

Q. 1944? [31] A. Yes, sir.

Q. Where did you join the ship?

A. In Seattle.

Q. Where were you on December 28th, 1944?

A. In the Philippines.

The Court: December 28th, was it?

Mr. Geisness: Yes.

Mr. Pellegrini: This is all admitted in the Answer to the Libel, your Honor.

Q. (By Mr. Geisness): The Libel states that you and the ship were in Mindoro, Philippine Islands, is that correct? A. Yes, sir.

Q. What occurred on that day?

A. About 10:30 in the morning there were suicide planes came over and they dove into different ships, and dove into ours, too.

(Testimony of Benjamin W. McNair.)

Q. Were you injured? A. Yes, sir.

Q. What kind of an injury did you sustain?

A. Shrapnel injury.

Q. In what part of your body?

A. In my neck.

Q. Were you rendered unconscious by that injury? [32] A. Not right at the moment.

Q. What did you do; where did you go?

A. They had an Army doctor on the ship that didn't get injured and he took care of the wounded.

Q. I didn't hear?

A. There was an Army Sergeant they had for medical attendance, like first-aid, and he took care of the wounded.

Q. Did he take care of you? A. Yes, sir.

Q. On board the William Sharon?

A. Yes, sir. He gave just a first-aid treatment because we were taken off by the destroyer.

Q. How long after that did you leave the William Sharon?

A. Oh, in about ten or fifteen minutes we were put board a destroyer.

Q. Did you remain on board that ship or on that and other ships until your return to the United States or did you go ashore at some foreign place for treatment?

A. No, sir. We were treated on the destroyer and then we were treated in New Guinea. And then we were—or rather we were taken to Hatii on the Hughes. Then we transferred there to New Guinea and had checkups there and treatments and

(Testimony of Benjamin W. McNair.)

then were put [33] back on the Hughes and sent to the States.

Q. When did you arrive in the United States?

A. March 2nd, 1945.

Q. At what port? A. Frisco.

Q. During the interval between the time you were injured and March 2nd, when you got back to the United States, what kind of treatment did you get? A. Well, that is hard to say.

Q. Was your shoulder operated upon?

A. No, sir. Well, I couldn't answer that. I wouldn't know, really.

Q. You don't know really what they did?

A. No, I don't.

Q. What was the condition of your arm during that period?

A. During that period it was very numb.

Q. Were you able to manipulate it—to use it and handle objects? A. No, sir.

Q. Could you lift it? A. No, sir.

Q. What was its condition when you got back to San Francisco; was it any different than what you have just described, and if so in what way?

A. Yes, sir. I could move it by the time I got back to Frisco.

Q. Were you able to use it for such things as dressing yourself and handling your clothing?

A. I had trouble with it but I didn't use it.

Q. Did you stay in San Francisco or did you go from there to some other place immediately?

A. No, sir. I left San Francisco for Seattle.

(Testimony of Benjamin W. McNair.)

Q. After you got back to Seattle, did you obtain any medical attention of any description?

A. No, sir.

Q. Did you at any time after your return?

A. Yes, sir.

Q. When was that?

A. In the Marine Hospital. I don't remember the date.

Q. Could you tell us just about how long it was after you got back? The Marine Hospital abstract would indicate that you were furnished out-patient care at the Marine Hospital from April 9th, 1945 to May 22nd, 1945? Does that agree with your recollection?

A. What was that? Will you state that again, please?

Q. April 9th, 1945 through May 22nd, 1945?

A. It was somewhere in there all right.

Q. What was the occasion of your going to the Marine [35] Hospital?

A. Well, I was told by the doctor on the destroyer if my arm didn't get better when I returned to the States after awhile to report to the Marine Hospital where I was at or to the hospital and have it checked.

Q. How did it get along after you got back to the United States until you went to the Marine Hospital?

A. It didn't get along so good.

Q. What was the trouble?

A. I was having trouble,—well, using it in general.

(Testimony of Benjamin W. McNair.)

Q. What kind of trouble did you have?

A. Well, mostly in lifting or—well, it was just in general work that I had trouble with it.

The Court: During what period of time,— general work during what period of time—before what date?

The Witness: Well, I got back on March 2nd to Frisco and then I came up home. We were down there a couple of days, I guess, before we got everything straightened out and headed home. I never tried to use it much for awhile after that.

The Court: I don't know what you were doing and why you would be using it and what you [36] were using it for. You see, I don't know anything about what you were doing after you left San Francisco or before.

The Witness: We came up on the train from San Francisco to Seattle and I didn't do nothing at the present. I was at home with my father.

The Court: How long did you stay at your father's home in Redmond after your return?

The Witness: I stayed there until I went to the Marine Hospital.

The Court: When did you go to the Marine Hospital?

The Witness: Around April, I guess; it seems like that, sir.

Q. (By Mr. Giesness): Did you stay in the Marine Hospital or were you just treated as an outpatient? A. Just treated.

Q. During that time, where did you live?

(Testimony of Benjamin W. McNair.)

A. In Redmond.

Q. Were you still at your father's home?

A. Yes, sir.

Q. Had you tried to do any work between the time you got back to San Francisco and the time you went to the Marine Hospital? [37]

A. Yes, sir, I did.

Q. What kind of work did you attempt?

A. I attempted gardening and orchard work.

Q. For hire or for your parents?

A. For hire.

Q. For hire? A. Yes, sir.

Q. How did you get along with that work?

A. Well, it was just a little too much for my arm.

Q. Did that have anything to do with your going to the Marine Hospital? A. Yes, sir.

Q. When you say you had trouble with your arm, what trouble did you have; I mean by that did you have trouble with some sensation or pain or weakness, or just what was the trouble?

A. Well, I had trouble with the weakness of it. When I lifted very much I could feel it.

The Court: What arm are you talking about?

The Witness: My right arm, sir.

The Court: Every time you speak of your arm, do you wish the Court to understand that you are talking about your right arm, unless you specifically refer to your left one?

The Witness: Yes, sir. [38]

The Court: All right.

Q. (By Mr. Geisness): Are you right or left-handed? A. Right-handed.

(Testimony of Benjamin W. McNair.)

Q. What if any treatment was given you at the Marine Hospital here in Seattle?

A. Will you restate that, please?

Q. What if any treatment was given you at the Marine Hospital here in Seattle?

A. What if any treatment?

Q. What treatment was given you?

A. They made an incision,—as far as I know, they made an incision at the Marine Hospital.

Q. Where did they make that incision,—what part of your body?

A. They made it in my neck, in my right arm, the shoulder.

Q. Was anything else done?

A. Well, they took X-rays of my right arm and neck.

Q. During the time that you were getting out-patient care at the Marine Hospital, beginning in April, 1945, were you doing any work?

A. No, sir.

Q. After the end of that out-patient treatment at the [39] Marine Hospital, did you do any work?

A. After a while, yes, sir.

Q. About when did you first do any work thereafter?

A. Oh, it wasn't too long after that I went back to sailing,—August something.

Q. I have a discharge indicating that you shipped on the SS Toloa August 13th, 1945. Is that the job to which you refer?

A. Yes, sir.

Q. Had you gone to sea on any occasion before that and after you got back?

A. No, sir.

(Testimony of Benjamin W. McNair.)

Q. In what capacity did you serve on the Toloa? A. In the engine room.

Q. What was your job in the engine room?

A. Oiler.

Q. Was that a temporary or permanent job?

A. That was a permanent job.

Q. That was a what?

A. A permanent job on that ship.

Q. How long did you stay on the ship?

A. I stayed the full length of the trip.

Q. Did you make any other trips than that trip?

A. No.

Q. Why not? [40]

A. No, sir. I don't believe I did.

Q. And why didn't you?

A. Well, I had a lot of heavy work to do and it was too much for me, so I changed and got off that ship.

Q. What kind of heavy work do you have to do as an oiler?

A. You are required to help the engineers in repairing condensers and cleaning condensers, working on heavy boiler plates, working on bluing the bearings and heavy parts on reciprocating engines; several kinds of heavy work like that.

Q. After you left the Toloa, which your discharge indicates was September 14th, 1945,—is that about the right date? A. Yes, sir.

Q. After you left the Toloa on that date, when did you next work?

A. It was awhile after that, I took another ship and sailed to Alaska again.

(Testimony of Benjamin W. McNair.)

The Court: Did you sign on that ship as a seaman after you were hurt with this shrapnel in Manila in 1944?

The Witness: Yes, sir.

The Court: What date did you sign on? [41]

The Witness: August 13th, 1945. Is that correct?

Mr. Geisness: That is what the discharge shows.

The Court: That Toloa was engaged in Alaska trade, was it?

The Witness: Yes, sir.

The Court: You may proceed.

Q. (By Mr. Geisness): Do you know about when it was that you took that next ship?

A. No, I don't.

Q. How long after you left the Toloa was it?

A. I guess it was about a month afterwards.

Q. In what capacity did you serve on the next ship?

A. I served up in the dining room, being a waiter on tables.

The Court: What ship was that?

The Witness: That was the Barranoff.

Q. (By Mr. Geisness): How long did you work on that ship?

A. I worked one trip. It was around twenty-seven days or something near that,—one trip to Alaska.

Q. Did you have any trouble with doing your work on [42] that ship?

A. Well, as long as it consisted of carrying heavy trays I had a little trouble.

Q. What kind of trouble did you have?

(Testimony of Benjamin W. McNair.)

A. Just a weakness in my right arm.

The Court: How long did you serve on the Barranoff?

The Witness: About 27 or 28 days, sir.

Q. (By Mr. Geisness): Since you left the Barranoff, have you ever again gone to sea?

A. No, sir.

Q. Why is that?

A. Well, sir, I tried it that last time and I just decided to give it up.

Q. Why did you decide to give it up?

A. Because I couldn't stand my own job in the engine room, because I belonged to the black gang in the first place and that Barranoff job was a temporary job.

Q. Did you have the proper papers to continue the job like you had on the Barranoff?

A. No, sir.

Q. Why couldn't you go back on the black gang and do black-gang work? [43]

A. Like I told you, it was just too much heavy work.

Q. Since you left the Barranoff, what kind of work have you done?

A. I have helped my father and my brother around home and with mechanical work.

Q. When did you first start doing that after you left the Barranoff?

A. It was a month or so afterwards, somewhere around in there.

Q. Do you work regularly at the jobs you have just mentioned, helping your brother and your

(Testimony of Benjamin W. McNair.)

A. No, sir; just when they have work to do, then I help them.

Q. Have you done any other kind of work since you left the Barranoff? A. Yes, sir.

Q. What have you done?

A. I tried apple picking.

Q. Where?

A. Over in the Valley at Brewster.

Q. Over in Eastern Washington?

A. Yes, sir.

Q. When did you do that?

A. Oh, that was in September of last year; somewhere in [44] there,—August or September.

Q. September, 1947? A. Yes, sir.

Q. How long did you work there?

A. My brother and I, I think, worked there a week or two weeks.

Q. How did you get along at that work?

A. Oh, you have to carry a heavy sack around your neck and I didn't get along so good with it.

Q. Did you leave before the job was finished or did you finish the job and then come home?

A. We left before the orchards were finished.

Q. You say "we left." Your brother, you say, went with you?

A. Yes. He came back with me.

Q. You both left, did you? A. Yes, sir.

Q. Were you able to continue with the work?

A. Well, it gave me quite a bit of trouble and I just didn't care to keep being bothered by it.

(Testimony of Benjamin W. McNair.)

Q. Since you left the Barranoff, have you done any work except those you have mentioned, helping your brother and your father in their work and picking apples in Brewster? A. No, sir. [45]

Q. Do your brother and father pay you for the work you do for them?

A. Well, I stay at my father's house, sir.

The Court: Yes. But do they pay you; do you get any money for the work you do or is that allowed on your board, your expense and keep?

The Witness: That is allowed on my expense and keep, sir.

Q. (By Mr. Geisness): What have you done for money other than the work you have done for your board and room at home?

A. What have I done besides those two jobs?

Q. Yes; what else have you done that you get money for? A. Nothing. That is all.

Q. What is your condition right now?

A. Well, it is better than it was before.

Q. Do you have any trouble with your arm?

A. Yes; I have a weakness in lifting of my right arm.

Q. Are you able to return to your engine room work now?

A. I wouldn't know, because I haven't tried it.

Q. Judging from your experience at Brewster when you were picking apples last September, would you say that you were at that time able to return to your engine room work on board ships?

(Testimony of Benjamin W. McNair.)

A. I couldn't tell you because I wouldn't know without trying it. If I had tried it, I could very definitely have stated whether I could have or whether I couldn't have.

Q. After your return from the Sharon, were you called up for military service?

A. Yes, sir.

Q. About when was that, do you remember?

A. It was just shortly after I was home. I don't remember the exact date.

Q. Were you accepted or rejected?

Mr. Pellegrini: If the Court pleases, the record would be the best evidence of that.

The Court: Counsel has a right to ask him if he knows.

Mr. Geisness: May I have the document marked?

(Certificate of Fitness marked as Libelant's Exhibit 1 for identification.)

Q. (By Mr. Geisness): You are being handed what has been marked as Libelant's Exhibit 1 for identification. Are you the Benjamin W. McNair named in that paper? A. Yes, sir.

Mr. Geisness: We offer Libelant's Exhibit 1 [47] in evidence, if the Court please.

Mr Pellegrini: Objected to, if the Court please, as immaterial.

The Court: I think you ought to prove its materiality,—if that is not admitted, and apparently it is not, in view of the objection stated.

Mr. Pellegrini: It is not properly identified.

(Testimony of Benjamin W. McNair.)

If there are certain matters appearing in the document about which the libelant wishes to have testimony, the document itself—if it were admitted—would deprive the respondent of the right to cross-examine. I am objecting to it on all of those grounds.

The Court: You may inquire concerning its proper identification and authentication as an admissible document.

Q. (By Mr. Geisness): Where did you obtain that document, marked Exhibit 1?

A. From Seattle, from the Army, where they give you a physical checkup.

Q. Had you been given a physical examination by the Army before you received that document?

A. Yes, sir. [48]

Q. And before you received that document had you been notified to report for Military Service?

A. Yes, sir.

Mr. Geisness: It seems to me, Your Honor, that the document now shows rejection for one employment and that was Service in the Military Forces and a rejection on the grounds of physical unfitness.

The Court: Well, I don't know whether it does or not.

Mr. Pellegrini: Physical unfitness may be due to syphilis; I don't know.

Mr. Geisness: It has to be taken into consideration with all of the other evidence.

Mr. Pellegrini: It deprives us of the right to cross-examine the offer of the document.

(Testimony of Benjamin W. McNair.)

The Court: Would your objection be the same if it had been issued by the Marine Hospital concerning his ability to continue his work as a seaman?

Mr. Pellegrini: As related to this particular injury?

The Court: Yes.

Suppose after this examination and after the operation, the Marine Hospital had issued a certificate [49] similar in character to this.

Mr. Pellegrini: Stating that he was rejected because of physical disability due to the shrapnel? I would have no objection in that case.

I don't know whether this certificate is based upon the fact that he had been wounded at Mindoro or not. I wouldn't have any way of knowing.

The Court: The objection is sustained.

Mr. Pellegrini: I don't know what the reason for it is and have no way of knowing.

Q. (By Mr. Geisness): At the time you received Libelant's Exhibit 1, did you have physical impairment of any kind other than the injury sustained in the Philippine Islands on December 28th, 1944?

A. No, sir. That was the idea. They told me in there that that was the reason I was being rejected.

Mr. Pellegrini: Objected to.

The Court: You can't state what was said in there. The rules of evidence prevent you from doing it and those rules apply to every kind of a case.

(Testimony of Benjamin W. McNair.)

Mr. Geisness: We renew the offer of Libelant's [50] Exhibit 1 on the ground that under the proof now there was no physical impairment except the condition resulting from the injury in the Philippines. Of course, as a matter of proof, Respondent might prove anything else as to his physical condition.

The Court: The exhibit itself confines the duration of the period of certification, does it not?

Mr. Geisness: Yes.

Mr. Pellegrini: It is not a certified copy. I won't object to it on that ground.

Mr. Geisness: I understood Your Honor's inquiry was whether it confined the period?

The Court: That is correct. My question was whether it tends to limit the life of the certificate.

Mr. Pellegrini: It is limited to six months.

Mr. Geisness: It declares for a period of six months.

The Court: The objection is overruled as to this exhibit under the testimony.

This exhibit is now admitted.

Mr. Pellegrini: Exception, Your Honor.

The Court: Allowed. [51]

(Libelant's Exhibit 1 received in evidence.)

(Testimony of Benjamin W. McNair.)

LIBELANT'S EXHIBIT NO. 1

Selective Service System

CERTIFICATE OF FITNESS

[Stamp] (Local Board No. 2, King County, June 5, 1945, Kirkland, Washington.)

Benjamin Willy McNair. Order Number 12250-A.

Having been forwarded for preinduction physical examination and having been examined, I hereby certify that you have been found:

1. [] Physically fit, acceptable for general military service.
2. [] Physically fit, acceptable for limited military service.
3. xxxxxx
4. [x] Rejected, physically unfit. Temporarily—
Re-examine in 6 mos.
5. [] Rejected, physically fit but unacceptable for other reasons.

Date of examination: 5 June, 1945.

C. L. BARRETT, Capt., AGD

Induction Station Commander

/s/ C. L. BARRETT, Capt., AGD

OIC Armed Forces Trav. Board,
Seattle, Wash.

Mr. Geisness: I think that is all of the questions that I have, if the Court please.

The Court: I will say this: The Court received that in veidence and will consider it only as a circumstance indicating that he was rejected as physically unfit for the Army. The Court will not con-

(Testimony of Benjamin W. McNair.)

sider it as evidence that he was unfit for anything else.

That is a circumstance that may have some bearing on whether or not he was physically disabled. It is circumstantial evidence,—not direct evidence of it. That is what I mean to say.

(Letter dated 10/9/46 marked Respondent's Exhibit A-2 for identification.)

(Letter dated 2/10/47 marked Respondent's Exhibit A-3 for identification.) [52]

Cross Examination

By Mr. Pellegrini:

Q. Mr. McNair, you were injured September 28th, 1944, were you not? A. Yes, sir.

Q. How long after your injury was it before you could move your arm?

A. I could not distinctly date the weeks or days it was.

Q. I mean approximately, sir; I realize that.

A. Within a few weeks.

Q. As a matter of fact, you could move your fingers and arm within three weeks after the injury, is that correct, sir?

A. Around somewhere in there.

Q. So that at the end of three weeks you were able to move your arm and use all of your fingers, is that correct? A. In about that time.

Q. Of course, your arm was weak naturally, was it not? A. Yes.

Q. And you were able to dress yourself within three weeks, were you not?

(Testimony of Benjamin W. McNair.)

A. I didn't use that arm to dress myself within that time. [53]

Q. When did you first start dressing yourself?

A. Just shortly before I arrived in Frisco.

Q. And you arrived in Frisco when?

A. March 2nd.

Q. 1945? A. '45.

Q. And at the time you arrived in San Francisco on March 2nd, 1945, did you report the fact of your injury to the Maritime Commission or to the United Fruit Company who were operating the vessel?

A. It was reported to the United Fruit Company.

Q. Who did you report to at the United Fruit Company?

A. I did not report it. It was reported by the officials on the ship.

Q. You, yourself, did not report to them, did you? A. No, sir.

Q. You did not report, yourself, that you were incapacitated,—that you were disabled?

A. That is better. I understand that. No, I didn't, sir.

Q. You never made any report of any disability to the Maritime Commission or to the United Fruit Company until some time in 1946, isn't that right, when you filed a claim with the Maritime Commission?

A. I don't know exactly the date on that, when I filed [54] the claim.

Q. Didn't you send the claim in, in October,

(Testimony of Benjamin W. McNair.)

1946, or your attorneys send the claim in for you on that date? A. Just about that date.

Q. I will hand you what has been marked for identification Respondent's Exhibit A-2 and ask you if that is the claim signed by you attached to that exhibit? A. Yes, sir, this is.

Q. And that was forwarded by a letter of your attorneys, was it not, under date of October 16th, I believe, 1946?

A. I couldn't state the date.

Q. Would you examine the first document and answer if that is the right date?

A. October 9th, 1946.

Q. So that until that time no report or any claim was ever made, is that right, sir, by you?

The Court: By you personally as distinguished from some other. A. No, sir.

Q. (By Mr. Pellegrini) When did you make a claim, sir?

A. I didn't make any claim, sir. [55]

Q. That is the first notice of any claim disability, is it not? A. That is right.

Q. However, you went to the Marine Hospital in 1945, is that correct?

A. Somewhere in there.

Q. What month?

A. It was in April somewhere, I suppose. I don't remember the exact date.

Q. It was April 9th, 1945,—would that be the correct date? A. Around there, yes, sir.

Q. And you received out-patient treatment while you were up there, did you not? A. Yes.

(Testimony of Benjamin W. McNair.)

Q. Following that out-patient treatment, you were found fit for duty at sea, were you not?

A. I couldn't answer that question.

Q. I will hand you what has been marked Defendant's Exhibit A-3 for identification and ask if the abstract of your clinical record is not attached to that exhibit?

A. If you would restate the question, please?

Q. Isn't that an abstract of your clinical record at the Marine Hospital during the period April 9, 1945 [56] to May of 1945?

A. I couldn't say the statement was unless I knew it came from there, sir.

Q. Doesn't it purport to come from there?

A. That is what it looks like.

Q. And it is referred to in the letter signed by your attorneys, addressed to the Maritime Commission, is it not?

A. Yes, sir.

Q. You recognize the signature of your attorneys on the first document of that exhibit, do you not, sir?

A. Yes, sir.

Q. And that clinical record or abstract of record is referred to in that letter, is it not?

A. Yes, sir. I believe it is.

Q. As being your clinical record or an abstract of your clinical record, isn't that right, sir?

A. Yes, sir.

Mr. Pellegrini: I offer Respondent's Exhibit A-2 and Respondent's Exhibit A-3 in evidence, if the Court pleases.

Mr. Geisness: No objection.

The Court: Each of them is now admitted. [57]

(Testimony of Benjamin W. McNair.)

RESPONDENT'S EXHIBIT A-2

Bassett & Geisness
Attorneys at Law
811 Alaska Building
Seattle 4

October 9, 1946

War Shipping Administration
Division of Wartime Insurance
99 John Street
New York, New York

Attention: Mr Cantwell

Gentlemen:

We enclose a claim under the Second Seamen's War Risk Policy, and will appreciate it if you will send communications respecting this claim to us.

Yours very truly,

JG:b /s/ JOHN GEISNESS.

[Barrett & Geisness Letterhead]

September 6, 1946

War Shipping Administration
Division of Wartime Insurance
99 John Street
New York, New York

Attention: Mr. Cantwell.

Re: Benjamin W. McNair

SS "William Sharon"

Gentlemen:

On December 28, 1944, I was employed as a member of the crew of the SS "William Sharon", being operated for the United States of America

(Testimony of Benjamin W. McNair.)

through the War Shipping Administration. On said date while said vessel was at Mindoro, P. I., I sustained shrapnel wounds in the right side of my neck when said vessel was struck by bombs dropped from enemy aircraft. As a result of said wounds I was totally disabled until August 13, 1945, and have been permanently disabled to a very substantial degree.

By reason of the foregoing, claim is made under the Second Seamen's War Risk Policy.

My home address is Box 673, Redmond, Washington. I was born

Yours very truly,

/s/ BENJAMIN W. McNAIR.

RESPONDENT'S EXHIBIT A-3

[Bassett & Geisness Letterhead]

February 10, 1947

Mr. W. H. Cantwell, Chief Adjuster

Division of Insurance

U. S. Maritime Commission

45 Broadway

New York 6, New York.

Re: Benjamin McNair

SS William Sharon

Dear Sir:

This letter is in response to yours of October 23, 1946 in which you request certain information concerning Mr. McNair.

After his repatriation March 2, 1945, Mr. McNair, on April 9, 1945, reported to the Marine Hos-

(Testimony of Benjamin W. McNair.)

pital in Seattle. We enclose an abstract of the hospital's clinical record indicating that Mr. McNair was an out-patient until May 22, 1945, and that the hospital found a foreign body overlying the right clavicle and right first rib but considered him fit for work without removal of the body. McNair was unable to work and stayed at the home of his parents in Redmond, Washington until about the 13th of August, 1945 when he became a member of the crew of the SS "Toloa" in Seattle.

McNair was rejected as physically unfit by Local Board No. 2, Kirkland, Washington, June 5, 1945 with a direction that he be re-examined in 6 months. The doctors at the Marine Hospital recommended against removal of the shrapnel and it has never been removed.

Yours very truly,

/s/ JOHN GEISNESS.

[Printer's Note]: Abstract of Clinical Report attached is read into evidence, below.

(Respondent's Exhibit A-2 received in evidence.)

(Respondent's Exhibit A-3 received in evidence.)

Mr. Pellegrini: I would like at this time to read the Abstract of the Clinical Record, which is part of Respondent's Exhibit A-3.

The Court: You may do that.

Mr. Pellegrini (Reading):

(Testimony of Benjamin W. McNair.)

“ABSTRACT FROM CLINICAL RECORD

“May 25, 1945

“Name: McNair, Benjamin W.

“Occupation: M. S.

“Age: 18 years.

“Last Vessel.: S.S. William Sharon.

“Furnished hospital care from....., 19.....,
to....., 19.

“Furnished outpatient care from April 9, 1945,
to May 22, 1945.

“Diagnosis: Foreign body overlying right clavicle and right first rib.

“Condition of Patient Upon Admission

“Patient complained that he had shrapnel in his neck. Examination shows a small pea size scar on right lower side of neck through which a blackened pinhead size spot can be seen. An incision and exploration down to external fascia revealed no evidence of shrapnel. X-ray of right side of the neck showed a small dense triangular shaped foreign body overlying the right clavicle and the right first rib where they cross. No other foreign bodies are evident.

“Patient complained he cannot lift anything without arm giving out or cramping. He was referred to our surgical service where he was examined with the following report:

“ ‘Small scar right supra clavicular region. Motions of shoulder, arm, elbow and hand normal. No signs of fracture. There is a foreign

(Testimony of Benjamin W. McNair.)

body near the right clavicle. In my opinion he is physically fit for duty.'

"Condition of patient on.....

"5-22-45—Fit for duty.

/s/ PAUL D. MOSSMAN

Medical Director—United States
Public Health Service, in Charge."

US Marine Hospital (Station) Seattle, Washington, AM.

(U. S. Public Health Service Seal) [59]

The Court: Will the remainder of your cross-examination be extensive, Mr. Pellegrini?

Mr. Pellegrini: I don't believe so, Your Honor, I would like to call Dr. Wagner this evening. He is a surgeon and must operate tomorrow.

The Court: Step down from the stand temporarily.

(Witness temporarily excused.)

The Court: You will have to call the doctor now if you are going to examine him.

Mr. Pellegrini: Dr. Jacob C. Wagner.

JACOB C. WAGNER,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pellegrini:

Q. State your name, please, doctor.

A. Dr. Jacob C. Wagner. [60]

Q. What is your occupation, sir?

A. I am Resident in Surgery at the United States Marine Hospital.

(Testimony of Jacob C. Wagner.)

Q. How long have you been a surgeon?

A. I have had surgical experience for a total of about three and a half years.

Q. To what extent?

A. Oh, general surgical work and working as Assistant with specialists in the various branches of surgery.

Q. In what service?

A. Public Health Service.

Q. Has all of your experience been in the Public Health Service, Doctor? A. Yes, sir.

Q. From what school did you graduate?

A. University of Nebraska.

Q. When? A. 1942.

Q. Since graduating from the University of Nebraska, you have been in the Public Health Service all of the time, is that correct?

A. Yes, sir. I interned in San Francisco with the Public Health Service.

Q. You have been attached to what particular hospitals?

A. I have been in the National Institute of Health for [61] one year doing research. I have been at the Marine Hospital in Louisville, Kentucky for about a year and four months doing general surgery; and another five months at Memphis, Tennessee doing general surgery. I have had about twelve,—about eleven months duty overseas and then returned to Federal Prison assignment in Springfield, Missouri for four months.

I was then assigned to the Seattle Marine Hospital.

(Testimony of Jacob C. Wagner.)

Q. What type of work have you specialized in during your service?

A. Most of it has been surgery.

Q. Are you presently engaged in surgical work at the Marine Hospital? A. Yes.

Q. Did you have occasion to examine Benjamin McNair? A. Yes.

Q. When?

A. I examined him Saturday morning; I don't know what that date was.

Q. At the Marine Hospital?

A. At the Marine Hospital.

Q. Prior to examining him, did you review the record at the Marine Hospital? [62]

A. Yes, sir.

Q. Do you have those records with you, sir?

A. Yes, sir. I had them on the desk there.

(Hospital Records marked Respondent's Exhibit A-4 for identification.)

Q. Those are the records at the Marine Hospital relating to Benjamin McNair, are they not?

A. Yes, sir.

Q. And those records are kept in the regular and usual course of the business at the hospital, are they? A. Yes, sir.

Q. And are required to be kept?

A. They must be returned and kept there.

Mr. Pellegrini: I offer them in evidence.

Mr. Geisness: I don't have any objection to this exhibit, so far as it pertains to the examination made by the doctor and the entries made by him.

(Testimony of Jacob C. Wagner.)

There are some entries made back in 1945 by another doctor—unidentified—so that I can't tell who he is. I do object to those entries.

The Court: The questions asked have a tendency to qualify those letters. I will permit counsel for the government to ask further questions concerning those parts of the records [63] in this exhibit not made by this witness.

Q. (By Mr. Pellegrini): Doctor, as to those portions of that exhibit which consist of documents and entries in documents made by other doctors, I will ask you whether or not under the rules and regulations of the Public Health Service you are required to make such entries,—each doctor?

A. Yes, we are. We have to keep records of each patient.

Q. Do you have to keep an accurate record of each visit and make entries?

A. That is right.

Mr. Geisness: I think I can withdraw my objection and I will do so now. It is extending the examination unnecessarily.

The Court: This Respondent's Exhibit is now admitted.

(Respondent's Exhibit A-4 received in evidence.)

Q. (By Mr. Pellegrini): When you examined Mr. McNair on Saturday, did you take a history from him? A. Yes, I did.

Q. Will you tell the court what Mr. McNair told you?

(Testimony of Jacob C. Wagner.)

A. Under "history" I have " I was hit by a shrapnel [64] December 28th, 1944 in Mendoro by a suicide plane attack. I had no trouble with the arm up to that time. I bled considerably at the time and was treated on board a destroyer that picked me up twenty minutes after the hit."

And then in the past tense:

"He was all numb down the arm and into the chest. He was unable to move his arm. He tried to move it and couldn't. It was in the second week before he could move his arm. He could move his fingers in the third week. He did not try to eat or hold things in his arm until March, 1945. At the present time he has no pain. He feels his right arm in general is not as sensitive as the left but there is no definite numbness. In ordinary use, eating and so on, there is no trouble. If he writes too long"

—I asked him how and he said about one or two hours—

"he gets cramps in his fingers. On lifting weights he develops a diffuse dull pain in the right side of his neck. His arm plays out or gets tired fast and he can't hold onto anything."

That is all under "history." [65]

Q. (By Mr. Pellegrini): Following that history, Doctor, you made a physical examination?

A. Yes.

Q. Just tell the Court what you found as a result of your physical examination and the extent of your examination.

(Testimony of Jacob C. Wagner.)

A. I examined the patient as to his general appearance and condition. He appeared to be in good health,—well nourished. I gave him a dynamometer test to check his grip. “In his right hand he recorded fifty-five pounds of pressure and in the left hand eighty-five pounds. The motion at the shoulder, elbow, wrist and all of the fingers was all in the full range of normal motion. There was no evidence of intrinsic muscular wasting, no atrophy, and there was normal ulnar, radial, and medial nerve function.”

Those are the three nerves of the arm.

“The circumference measurements of the arm and the forearm, right—28 centimeters, left—26.5. The forearm was right—26.5 centimeters and the left 26.0 centimeters. There is no evidence of a horner syndrome.”

Q. A what, doctor? A. Horner syndrome.

Q. Syndrone? [66] A. Syndrone.

Q. What is that, sir?

A. That is evidence of involvement of the sympathetic nerves to the head. It is a chain of nerves which arise in the cheek and run up the side of the neck and control the pupil and the sweat glands and so on of the head and neck. It is the involuntary nervous system.

Reflexes, I have got “Symetrically hypoactive, byceps and triceps and radi-ulnar.

Q. What do you mean by that, sir?

A. The reflexes are tendon jerks,—involuntary jerks of the tendons to the sudden impact of a percussion hammer.

(Testimony of Jacob C. Wagner.)

Q. What do they indicate?

A. They indicate that the sensory nerves to the muscle endings,—that is, the sensory fibers in the muscle which give their tone—and the reflex through the spinal cord and the motor nerve back to the muscle are all intact.

Q. Operating properly?

A. Operating properly.

Q. Did you find any symptoms of muscle impairment in the right arm of either the forearm or the upper arm? [67]

A. I could find no direct evidence except the dynamometer testing which suggested that the right grip was somewhat weaker than the left.

Q. Did you find anything other than that wrong with the upper or the lower part of the right arm?

A. No, sir.

Q. Doctor, what tests did you perform to determine whether or not there was any nerve damage?

A. Well, the usual tests are sensory to see if there is any loss of sensation of the skin anywhere in the arm and shoulder. I tried that on the patient. I have drawn pictures of the purported numbness. It doesn't fit any definite nerve pattern. And it fits in generally with the patient's statement that there is some diffuse numbness of the arm which he certainly can't limit as to definite location, and has no definite relationship to the injury of the neck that I could see.

Q. In other words, he reacted normally as far as sensory tests were concerned?

(Testimony of Jacob C. Wagner.)

A. He stated that he felt numb in different parts of the arm. But the distribution of the numbness did not fit any nerve pattern as ordinary tests found on testing specific nerve injuries.

Q. What other tests did you perform with regard to [68] possible nerve injury?

A. The reflexes as stated. And evidence that there is injury to the nerves and to the muscle in the form of atrophy of the muscle. There was no atrophy.

Q. Doctor, did you find any objective symptoms whatever of any impairment of the use of the libellant's right arm,—that is on the day of your examination last Saturday, which was the 17th of April of this year?

A. I could not be certain that there is any evidence of any definite injury to the arm, from my examination.

Q. Did you find any?

A. The dynamometer testing has been referred to,—weakness. I did two tests which are quite new and I don't,—the exact importance of them is not well established, and I don't think they would be suitable evidence for a court.

Q. Well, what were those tests?

A. They were oscillometrick readings in which a cuff is applied to the arm and a small needle, with the cuff inflated and under pressue, with each pulsation of blood into the arm there is a variation, measured by the flick of a needle in the instrument. The degree of flick of the needle indicates a

(Testimony of Jacob C. Wagner.)

stronger or weaker thrust on the cuff on the arm. And the greater [69] the flick, the greater the change of volume with each pulsation. In general, there was a slightly less oscillation of the needle on the right forearm as compared to the left. There is no difference shown in the upper arm. I also measured the temperatures at various points on both of the arms and shoulders, and found the temperature to be slightly lower in the various points,—the shoulder, the elbow, wrist, thumb, index finger, and little finger,—to be slightly lower than that of the left arm, which would indicate a slight degree of impairment of the blood flow to that arm.

Q. Doctor, based upon your objective findings, can you state whether or not in your opinion Mr. McNair would be able to follow his occupation as a merchant seaman?

A. On the basis of objective findings?

Q. Yes, sir.

A. No, there is no evidence that he couldn't follow them.

Q. In other words, in your opinion, he could follow them?

A. Based upon objective findings.

Q. You had some subjective complaints, did you not?

A. Yes, the patient's statements.

Q. And those statements were that he had a weakness or a numbness?

A. As he gave them to me, a kind of a diffuse dull pain in the shoulder, with the arm getting tired easily and giving out.

(Testimony of Jacob C. Wagner.)

Mr. Pellegrini: Considering the circumstances, I will rest as far as this witness is concerned.

Cross-Examination

By Mr. Geisness:

Q. What does anesthesia that doesn't follow any particular nerve pattern indicate?

A. I don't know, sir.

Q. Isn't that sometimes found in the case of a functional disorder?

A. Yes. It frequently is functional.

Q. If you are convinced that a person is honestly experiencing a disability or a feeling of disability, and then shows an anesthesia that doesn't follow any particular pattern, don't you consider the anesthesia to be significant as indicating a functional disorder? [71]

A. Not necessarily, sir. Usually you have a definite pattern with those; and this does not fit the usual functional pattern.

Q. Would an impairment of the brachial plexus have any possible effect upon the blood supply to the right arm? A. Yes, it could.

Q. How does that happen?

A. By reflex irritation of the basal motor nerves to the blood vessels of the arm.

Q. That nerve, then, activates the muscles that cause the blood to pass through the arm, is that right? A. It controls the blood vessels.

Q. The controls the blood vessels?

A. Yes.

(Testimony of Jacob C. Wagner.)

Q. Does that record you have—I am sorry I can't identify it by number—I think it is Respondent's Exhibit A-4. A. A-4.

Q. Does that indicate what the reflexes were in April and May, 1945?

A. No, there is no record that I have seen here.

Q. Does it indicate what if any loss of strength there was in the hand or arm at that time?

A. No, there is no recording of the strength.

Q. Does it indicate whether or not there was any atrophy at that time?

A. It was not recorded if it was examined.

Q. You never saw the man before last Saturday? A. No, I didn't.

Mr. Geisness: I think that is all I have.

Mr. Pellegrini: I have no further questions.

The Court: Mr. Pellegrini, does it occur to you that there is any question that you have overlooked which is material?

Mr. Pellegrini: No further questions.

Mr. Geisness: No further questions.

The Court: You are excused, Doctor.

(Witness excused.)

The Court: Court is adjourned until tomorrow morning at 10:00 o'clock.

(At 5:03 p.m., Tuesday, April 20th, 1948, proceedings adjourned until April 21st, 1948 at 10:00 o'clock a.m., in the United States Court House.) [73]

Seattle, Washington

April 21st, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: Come forward and resume the stand.

BENJAMIN W. McNAIR,
previously sworn, resumed the stand and testified
further as follows:

Cross-Examination—(Continuing)

By Mr. Pellegrini:

Q. Mr. McNair, following your examination in May in the Marine Hospital, when you were discharged from the hospital, you thereafter sailed again, didn't you?

A. Yes; a short while after that I believe. [74]

Q. How many trips did you make on the Toloa? Toloa?

A. I made that one and then I think I made one more. I am not positive.

Q. Well, as a matter of fact, you made two more, didn't you, sir?

A. Well, I made one. There was a short trip and then they had two that went together.

Q. Well, you were on the Toloa for the trip from August 13th, 1945 to November 3rd, 1945, isn't that correct?

A. I think it is pretty close, yes.

Q. And then you signed on again on November 9th, 1945, is that right?

A. Yes, I think so.

(Testimony of Benjamin W. McNair.)

Q. Just a few days after the other trip ended. And that trip last until December 24th, 1945, is that right, sir? A. I think that is correct.

Q. And then you signed on again January 1, 1946, and you sailed on February 28th, 1946, did you not? That was the third trip?

A. Yes. There were two connecting trips there. There were two short ones.

Q. So that after the first trip which you testified to on cross-examination you sailed on two other trips? [75] A. Yes.

Q. And the days that I have given you,—the last date ending in February, 1946—are approximately correct, are they not, sir?

A. Approximately, yes.

Q. In what capacity did you sail?

A. To start with I sailed as an oiler on that ship, sir.

Q. On the second trip what were you?

A. The second or third trip I was working as a junior engineer. That was the second trip, I think,—as an engineer.

Q. On the third trip what did you sail as?

A. I had the same post.

Q. As a junior engineer?

A. Well, as an engineer. I don't know what they stated. That was just a promotion.

Q. I see. Following that you stayed ashore for approximately two months and you sailed on the Barranoff then, didn't you?

A. Yes. That was my last trip. That was just a temporary—

(Testimony of Benjamin W. McNair.)

Q. And you sailed on the Baranoff on May 8th, 1946, and got off here on May 23rd, 1946, is that right? A. I think that is correct.

Q. During these voyages that you went to sea on the [76] Toloa and the Barranoff, your services were satisfactory all of the time, were they not, sir,—in other words, you got satisfactory discharges, did you not?

A. Oh, yes; I believe I did.

Q. There was no complaint by any of your superior officers that you didn't do the work you were supposed to do, isn't that right?

A. Well, I couldn't tell you that. I couldn't vouch for them.

Q. Well, the fact is they gave you satisfactory discharges?

A. The discharges, yes,—they were put out by the Captain. They weren't put out by the officers.

The Court: Repeat in this connection the name of the last vessel that you worked on prior to the Barranoff.

The Witness: Toloa.

Q. (By Mr. Pellegrini): While you were working on these vessels, did you work any cargo while the ships were in Alaska?

A. I checked down in the cargo hold.

Q. You checked on it? A. Yes. [77]

Q. And assisted sometimes in the course of your checking in handling the cargo, did you not?

A. Not very often. You see, all we had to do was handle the cargo.

(Testimony of Benjamin W. McNair.)

Q. I understand. But occasionally you would have to assist in the course of your checking work, would you not—move crates around and do things of that nature in order to determine whether you had the right item that you were checking.

A. No. You see, deckhands do all of that.

Q. I think you testified that you picked apples for two weeks? A. Yes, approximately that.

Q. And that was over at Eastern Washington?

A. Yes, sir.

Q. You and your brother together?

A. Yes, sir.

Q. Your brother didn't like it, so you left, is that it? A. No, sir.

Q. What was it?

A. It was on account of that I couldn't keep up with the work.

Q. You couldn't keep up with the work?

A. No, sir. [78]

Q. You mean reaching overhead all of the time?

A. When you get a sack around your neck with a load of apples, there is quite a bit of weight in it.

Q. Since that time you have been working in a garage, have you not? A. Not a garage.

Q. What is it?

A. It is just that my dad gets a car once in a while to work on. He doesn't own a garage.

Q. Well, he does mechanical work at your home?

A. Now and then when a car comes in.

Q. You assist your father in that work?

A. My father and brother, yes.

(Testimony of Benjamin W. McNair.)

Q. They work at it regularly?

A. Just when they get a car, like I told you, sir.

Q. When they get them, you work around—

A. I help them.

Q. You help them? A. Yes.

Q. You have been working quite regularly at it, have you not?

A. No,—just helping now and then, when they get one.

Q. Every time they get one and there is work to do, you work on it, is that right?

A. Yes, if he needed the help. [79]

Q. That is regular garage work,—by that I mean it is the same type of work as garage work?

A. It depends on what you do.

Q. What machinery do you have?

A. We don't own any machinery.

Q. Do you grind valves?

A. We don't have any machinery.

A. No, sir. That is done out.

Q. Do you take the motor down so that the valves can be ground?

A. My father and brother do that.

Q. And you help them, don't you?

A. Yes.

Q. All right. That means taking the head off of the motor and working around the motor, does it not? A. Yes.

Q. Do you ever take any motors out?

A. We have got a chain block for that.

Q. I understand. You have chain blocks on board ships to lift heavy objects, to,, don't you?

(Testimony of Benjamin W. McNair.)

A. Sometimes; sometimes you don't.

Q. But you do work around whenever you have a car and assist them, don't you?

A. I help, yes.

Q. You have rather a number of calluses on your hands, don't you, from working around? [80]

A. I wouldn't say I have got a number. I have got two, I guess.

Q. And they are on both the right and the left hands, aren't they? A. Yes, sir.

Q. They indicate that you have been doing quite a bit of work, as the doctor stated, isn't that right, Mr. McNair?

A. Well, I couldn't determine his statement.

Q. You work out in your Dad's garden, don't you? A. No, sir; I don't have a garden.

Q. Do you work around the neighborhood?

A. No, sir.

Q. You haven't done any of that at all?

A. No, sir.

Q. At any time? A. No, sir.

Q. I thought you testified on direct examination that you had done some garden work but you couldn't handle it?

A. That wasn't in the neighborhood. That was out of town.

Q. When was that?

A. I don't remember the date, but that was out of town.

Q. Now, since you left the Barranoff, May 23rd, 1948, [81] have you attempted to go to sea?

(Testimony of Benjamin W. McNair.)

A. No, sir, I haven't.

Mr. Pellegrini: That is all.

(Certificate of Discharge marked Libelant's Exhibit 2 for identification.)

Redirect Examination

By Mr. Geisness:

Q. Showing you what has been marked Libelant's Exhibit 2, tell us what that is, will you?

A. That is a discharge from service that you have at sea.

Q. Is that your discharge from service on the Toloa? A. Yes, sir.

Q. Does that relate to the first voyage you took after you were injured?

A. Yes, sir. I believe that is the first one.

Q. Are you sure?

A. I am pretty positive it was around August that I took my first ship.

Q. That discharge indicates August 13th, 1945 as the date of shipment, does it not? [82]

A. Yes, sir.

Q. And what date does it indicate as the date of discharge? A. September 17th, 1945.

Q. Did you take another voyage on the Toloa immediately or what was the situation?

A. Oh, they stayed in Seattle for a few days, I believe.

Q. Then did you remain on the ship?

A. I went home. And then I was already on the ship and I just went home and waited until we were ready to go.

(Testimony of Benjamin W. McNair.)

Q. Do you know when they went again?

A. No, I am not positive.

Q. Do you have your discharge from the following voyage?

A. No, I haven't. I got one discharge two trips later for both of the trips. They were both short trips and they put it on one discharge.

Q. That discharge indicates that your first voyage was from August 13th, 1945 to September 17th, 1945. I understand from your testimony on cross-examination that you served on the Toloa from August 13th, 1945 to November 3, 1945, is that correct to the best of your knowledge?

A. We have some short trips in there. Yes, I think that is correct. [83]

Q. And from November 9th, 1945 to December 24th, 1945, is that correct to the best of your knowledge?

A. Yes, I think that is correct.

Q. But you don't have the discharge covering any of those voyages except the one that has been introduced in evidence or has been identified as Libelant's Exhibit 2?

A. Yes. I had one for those last two trips I told you. But I haven't had it now because it is lost.

Mr. Geisness: I think that is all.

The Court: How long did you pick apples?

The Witness: Oh, it was a week or two, sir.

The Court: You may continue your examination.

(Testimony of Benjamin W. McNair.)

Recross Examination

By Mr. Pellegrini:

Q. You had another trip on the Toloa starting January 10th, 1946 and ending February 28th, 1946, did you not,—in other words, you sailed on the Toloa in the first two months of 1946, did you not? A. I believe somewhere in there, yes.

Q. Those dates are approximately correct? [84]

A. Yes.

Q. You recall being on board the Toloa in the months of January and February, 1946, do you not?

A. It was around in there, sir. I couldn't tell you without looking it up.

Mr. Pellegrini: That is all.

The Court: Step down.

(Witness excused.)

(Letter dated March 25, 1947, marked Libelant's Exhibit 4 for identification.)

Mr. Geisness: The Libelant offers Libelant's Exhibits 3 and 4 in evidence unless there is some objection.

Mr. Pellegrini: They are parts of the Maritime Commission files relating to this matter, Your Honor.

The Court: Is there any objection?

Mr. Pellegrini: I have none.

The Court: Each of them, Libelant's Exhibits 3 and 4 is now admitted. [85]

LIBELANT'S EXHIBIT NO. 3

United States Maritime Commission
45 Broadway, New York 6, New York

October 23, 1946

Bassett & Geisness, Esquires
811 Alaska Building
Seattle 4, Washington

Gentlemen:

Re: Benjamin McNair
SS William Sharon

We have for acknowledgment your communication of October 9, 1946, also enclosure, all in connection with the above entitled matter.

Our records would indicate that the subject claimant, following his separation from the SS William Sharon, was repatriated to San Francisco, aboard the SS David Hewes, arriving March 2, 1945. We have no evidence in our file which would indicate that he was disabled from sea duty subsequent to his return to San Francisco.

In order that we may be in a position to further consider this seaman's claim, we would ask that you be kind enough to have him furnish us with a statement relative to his activities subsequent to March 2, 1945; also, furnish us with the names and addresses of hospitals and/or physicians who have treated Mr. McNair subsequent to his return to San Francisco, and a report of their findings.

On receipt of the above requested information, we will be glad to further consider this matter and advise you accordingly.

Very truly yours,

W. H. CANTWELL,

Chief Adjuster

Division of Insurance

By: /s/ J. P. WHELAN

[Stamp]: Copy received Oct. 29, 1946. Bassett & Geisness.

LIBELANT'S EXHIBIT NO. 4

United States Maritime Commission

45 Broadway, New York 6, New York

March 25, 1947

In reply, refer to: JPW:ch-M

Bassett & Geisness, Esquires

Second and Cherry, Seattle 4, Washington

Gentlemen:

Re: Benjamin McNair

SS William Sharon

Further to our correspondence relative to the above captioned case and particularly in reply to yours of February 10, 1947.

There has been no evidence presented to this office which would indicate that your client suffered disability to the extent that he was unable to continue his usual occupation. Under the circumstances, therefore, we regret that no consideration can be granted to Mr. McNair under our Second Seamen's War Risk Policy, as amended.

In the event that Mr. McNair suffers future periods of disability from sea employment, which can

be directly attributed to injuries he sustained as a result of enemy action during his employment aboard the SS William Sharon, he may make application for further consideration. In such instance, it will be necessary for him to furnish us with testimony from an United States Marine Hospital or Public Health Service Facility confirming any period of disability for which he claims compensation.

Very truly yours,

W. H. CANTWELL,

Chief Adjuster

Division of Insurance

By: /s/ J. P. WHELAN

[Stamp]: Copy received Mar. 28, 1947.

(Libelant's Exhibit 3 received in evidence.)

(Libelant's Exhibit 4 received in evidence.)

LEO L. McNAIR,

called as a witness by and on behalf of the Libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisness:

Q. Will you state your full name, please?

A. Leo L. McNair.

Q. Is Benjamin W. McNair, the libelant here, your son? A. Yes, sir.

Q. Where does he live?

A. Redmond, Washington.

Q. With you? A. Yes, sir.

(Testimony of Leo L. McNair.)

Q. How long has he lived there?

A. All of his life.

Q. Apparently he has been away at sea part of the [86] time?

A. That is right.

Q. But he has made his home there while he has been away?

A. That is right.

Q. Do you remember the occasion of his return after he was injured in December, 1944,—do you remember the time when he returned in March, 1945?

A. Yes. I have a fair recollection of his return.

Q. Were you at home then?

A. That is right.

Q. Was he able to work at that time he returned?

A. I would say no.

Mr. Pellegrini: I object and move that the answer be stricken. I have no objection to the witness testifying what he observed.

The Court: The objection is sustained and the answer is stricken and the Court will disregard it.

Q. (By Mr. Geisness): After he returned in March, 1945, where did he live?

A. He lived at home.

Q. Do you remember when he first did any work?

A. No, I couldn't say exactly. I brought him back and forth to the Marine Hospital for outpatient [87] treatment.

Q. He has testified concerning his going to sea.

Do you remember the occasion of his going to sea after that injury?

(Testimony of Leo L. McNair.)

A. No, I wouldn't have the dates offhand. I think his discharge would come nearer getting that accurate. I believe what he stated is about right,— I believe it was some time in August that he sailed after his injury.

Q. Do you know what if any work he has done since that time?

A. I think he has stated he has helped me some. I do some mechanical work. I have no garage. I do an occasional job when one comes around,— people that know me and want me to do their work. He has helped me some. And his apple-picking, last year I believe it was, was of very short duration apparently. It possibly could have been two weeks. I don't just know exactly offhand.

Q. Do you pay him when he works for you or what is the arrangement?

A. Occasionally I give him a little money, sure, if we happen to have a little surplus money.

Q. Do you have any fixed rate of pay that you pay him? A. Oh, no, absolutely not. [88]

Q. Do you know of any outside work he has done except the apple picking and work on those ships?

A. No, I can't say offhand I do. He has had no regular jobs I know.

Q. How has his condition appeared to you since he returned? Of course, it may be at different times, but I wonder if you can give us an idea over the whole time, from time to time, as to how he appeared.

(Testimony of Leo L. McNair.)

Mr. Pellegrini: I object to the question, if the Court please.

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: Objection overruled.

A. Well, to begin with,—at least before he sailed the first time on the *Tolosa*, I have seen the boy pass completely out from nervous exhaustion. However, I don't think he does that any more. I haven't noticed his condition as being such recently. He is, however, a highly nervous sort.

Now, whether the injury has anything to do with that—and the action that he seen in the Philippines—I don't know. I know we didn't feel he was of a nervous sort before he ever went to work. Now, I am not in a position to say [89] just what reaction he has to that injury.

Q. (By Mr. Geisness): Have you noticed anything about the condition of his right arm and his use of it?

A. Normally I would say he uses his right arm practically as good as any one outside of perhaps some excessive strain or exertion. I am quite convinced that he does have some trouble there if he exerts himself or, as I said, under an excessive strain.

Q. Have you noticed any change in the use of that arm for the months or years now since he returned?

(Testimony of Leo L. McNair.)

A. I would say yes. I think it is a great deal better than it was.

Mr. Geisness: I think that is all.

Mr. Pellegrini: No cross-examination.

The Court: You may be excused.

(Witness excused.)

The Court: Call the next witness.

Mr. Geisness: Libelant rests, if the court please.

Mr. Pellegrini: Respondent rests, if the Court please.

The Court: Did anyone want to offer [90] Libelant's Exhibit 2?

Mr. Geisness: No, Your Honor. I only wanted to use it for refreshing the witness' recollection.

The Court: Is there any exhibit not admitted which proctors wish the Court to admit? My record shows all of the rest of the exhibits admitted.

Hearing no response to the Court's question,—let the record show that each of the parties now rests.

How long do you wish to argue?

(Final arguments heard by the Court on behalf of Libelant and Respondent, respectively.)

COURT'S DECISION

The Court: The Court considers this a hard case to decide upon the facts and evidence here brought before the Court.

I believe implicitly that Dr. Mackay was trying his best to be fair and to tell the truth as he understood it.

I also think that the other doctor, Dr. Wagner, was doing the same thing. And I think this libelant, himself, while on the witness stand, was a frank and honest witness.

My understanding of the evidence, however, is that this libelant was not disabled from making reasonable performance of his duties as a member of the black gang in the engine room as long as is now contended in his behalf.

I also think that the reasonable length of his reasonable disability in the attempted performance of his duties was longer than the government contends for.

I believe it fair and reasonable, from a preponderance of all of the evidence in this case, for the Court to find, and the Court does [92] now find from such preponderance, that the libelant was reasonably disabled from performing the duties ordinarily called for in the performance of black gang membership duties for the period of one year beginning March 2, 1945, and no more, and that in addition thereto he is entitled to recover the sum of \$325.00 on account of a permanent loss of the 10 percent of functioning which, however, does not disable him, making him in all a recovery in the total sum of \$1,525; and in addition thereto his costs and disbursements in this action to be taxed by the Clerk.

Mr. Pellegrini: Your Honor is dating that from March 2, 1945?

The Court: March 2nd. That means for the month of March he is entitled to \$100, and for each month thereafter for twelve months.

Mr. Pellegrini: If I may have an exception to Your Honor's ruling.

The Court: Exception allowed.

I am going to state one further detail in above

I am going to state one further detail in discussing this matter. The Court is convinced as above stated, because I think the libelant went back to work in the Alaska trade before he was entirely recovered from his disability respecting performance [93] by him of black gang membership duties. I believe, however, that from the standpoint of his ability to do the black gang membership work ordinarily required of members of that gang, his disability did not continue as long as he claims it **did**; at least the evidence in support of his contention that it continued up to the time he filed this action on September 4th, 1947 and later is not sufficiently convincing to the Court to make a finding favorable to him,—particularly in view of the fact that he did perform gainful service on board ships and in connection with his father's automobile repair work in the field of mechanics, where there wasn't any improved machinery used in his father's business, a circumstance which must call for a greater amount of hard physical labor by reason of the absence of machinery; and then by reason of the fact that he worked on that apple-picking job and notwithstanding the fact that he said he quit because he didn't succeed as well as he thought he ought to.

The Court is not greatly impressed by the circumstances surrounding his picking apples. His lack of complete success at apple picking may have

been due in part to his lack of aptitude in that [94] particular work rather than to his physical disability.

(Concluded.)

(At 11:15 a.m., Wednesday, April 21, 1948,
proceedings concluded.) [95]

CERTIFICATE

I, Merritt G. Dyer, Official Reporter for the United States District Court, hereby certify that as such official reporter I recorded the foregoing proceedings stenographically and the same have been reduced to typewriting under my personal supervision.

I further certify that the foregoing record is a full, true and correct transcript of the proceedings occurring therein.

/s/ MERRITT G. DYER,

Official Court Reporter.

[Endorsed]: Filed Dec. 7, 1948.

[Endorsed]: No. 12121. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Benjamin W. McNair, Appellee. Apostles On Appeal. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 10, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

In Admiralty—No. 12121

UNITED STATES OF AMERICA,

vs. Appellant,

BENJAMIN W. McNAIR,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF PARTS OF RECORD
To the Honorable Judges of the above entitled
Court:

Appellant herein, United States of America, hereby refers to and adopts as its Statement of Points on which it intends to rely upon appeal, the assignments of error included in the apostles on appeal heretofore transmitted to this Court; and

The said appellant hereby designates that the entire record (apostles on appeal) heretofore transmitted to the Court in this action, except Appellant's Exhibit A-4 (Hospital records, Marine Hospital, Seattle) be printed, together with this designation and adoption of Statements of Points on appeal.

Respectfully submitted,

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ FRANK PELLEGRINI,

Assistant United States Attorney.

(Acknowledgment of Service)

[Endorsed]: Filed January 13, 1949. Paul P. O'Brien, Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

BENJAMIN W. McNAIR
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

FRANK PELLEGRINI
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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APR 8 - 1949

PAUL P. O'BRIEN,

No. 12121

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STATUTES, ETC.

	Page
Sec. 1128d, T. 46, U.S.C.....	2
Secs. 741-752, T. 46, U.S.C. (Suits in Admiralty Act)	2
Secs. 1291 and 1294, T. 28, U.S.C.....	2
Secs. 1128 to 1128h, T. 46, U.S.C.....	2
1943 Supp., C.F.R., T. 46 — Shipping, Ch. III, War Shipping Administration, App. A, ps. 2127 et seq.	2
1944 Supp., C.F.R., T. 46 — Shipping, Ch. III, War Shipping Administration, App. A, ps. 3774-3775	2

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

I. STATEMENT OF JURISDICTION

This is an appeal from the final decree of the United States District Court for the Western District of Washington, Northern Division, in Admiralty. The action is to recover disability benefits under the Sec-

ond Seamen's War Risk Policy. Jurisdiction of the District Court is founded on the provisions of Section 1128d, Title 46, U.S.C. and Sections 741-752, Title 46, U.S.C. (Suits in Admiralty Act). The action being cognizable in Admiralty, to-wit; under the Suits in Admiralty Act, an appeal may be taken from the final decree to this Court pursuant to the provisions of Sections 1291 and 1294, Title 28, U.S.C.

II. STATEMENT OF THE CASE

A. FACTS.

Libelant was a member of the crew of the SS WILLIAM SHARON, a merchant vessel operated for the United States of America by the War Shipping Administration. He was employed as a fireman and water-tender (Aps. 47). As a crew member, he was insured under the Second Seaman's War Risk Policy issued pursuant to the provisions of Sections 1128 to 1128h, Title 46, U.S.C. The terms of the policy in force and effect at the time of the injuries suffered by libelant are set forth in 1943 Supp., C.F.R., Title 46 — Shipping, Ch. III, War Shipping Administration, App. A, ps. 2127 et seq. and 1944 Supp., C.F.R., Title 46, — Shipping, Ch. III, War Shipping Administration, App. A, ps. 3774 - 3775. For the convenience of the Court, we have set forth in the appendix to

this brief, all of the effective and applicable provisions of the said policy.

On December 28, 1944, while the vessel was at Mindoro, Philippine Islands, she was attacked by Japanese suicide planes (Aps. 47). In the course of the action, libelant was struck in his right shoulder by a metal fragment from an exploding bomb. He was treated by a Navy doctor aboard a destroyer and at a shore installation. As a result of his injuries, his right arm was numb and he could not use it until sometime in March, 1945 (Aps. 48-49). He was repatriated to the United States on March 2, 1945, arriving at San Francisco, California. At this time, his arm had improved to the extent where he could dress himself (Aps. 65).

Following his return to the United States, he went to the home of his parents at Redmond, Washington until he went to sea again in August of 1945 (Aps. 51). From April 9, 1945 to May 22, 1945, he received out-patient treatment at the Marine Hospital at which time he was discharged as fit for duty (Aps. 67-72, Respondent's Exhibit A-3). Although discharged as fit for duty, his arm still gave him trouble and he did not engage in any work until August 13, 1945 when he shipped aboard the SS TOLOA as oiler and junior engineer (Aps. 83). He served

on the TOLOA in this capacity until February 28, 1946 (Aps. 84, 91). Thereafter he sailed as a member of the crew of the SS BARANOF from May 8, 1946 until May 23, 1946 (Aps. 85). He received satisfactory discharges from his services on the TOLOA and the BARANOFF (Aps. 85).

Libelant was examined by Dr. Mackay, a practicing neuro-surgeon, on August 15, 1947 (Aps. 26), just prior to the commencement of this action (Aps. 2). This examination disclosed that shrapnel, which was still imbedded in the libelant's shoulder, had caused some injury to the brachial plexus nerves of the right arm (Aps. 30), with a slight diminution of the strength of the entire upper extremity (Aps. 31). It was the doctor's opinion that at the time of his first examination, that while libelant had a 40% to 50% loss of use of the arm for heavy types of work, he could perform lighter jobs and use ordinary size tools (Aps. 38-40). Libelant's doctor further testified that the presence of shrapnel would not incapacitate libelant (Aps. 40).

Dr. Mackay examined libelant the day before the trial and at that time found the libelant to be fully recovered insofar as objective symptoms were concerned (Aps. 36, 43). It was his further opinion that libelant had suffered a 10 per cent permanent dis-

ability of the loss of use of his right arm as compared to an amputation of the arm at the shoulder (Aps. 34-35).

The District Court found that

“* * * as a direct and proximate result of said injury libelant was continuously and totally disabled from performing any and every kind of duty pertaining to said occupation in which he was engaged at the time of said injury for a period of one year from and after March 2, 1945, the first date upon which libelant arrived in the continental United States following said injury.” (Aps. 11).

* * *

And

“As a direct and proximate result of said injuries, libelant has been and is permanently and partially disabled to an extent equal to 10% of the amputation of his right arm at the shoulder.” (Aps. 11).

The Court concluded libelant was entitled to recover the sum of \$1,800 for said period of disability and the additional sum of \$325 for permanent partial disability and costs (Aps. 12). A decree awarding libelant recovery in the sum of \$2,125, together with costs in the sum of \$37.20 was thereupon entered. (Aps. 13).

B. SPECIFICATIONS OF ERROR.

Appellant does not question that portion of the

decree awarding libelant a recovery for disability for the period from and after March 2, 1945 to August 13, 1945 or for a recovery for permanent partial disability equal to 10 per cent of the amputation of his right arm at the shoulder. Appellant does contend that the Court erred in finding that libelant was totally disabled from August 13, 1945 to March 2, 1946, within the meaning of the term "disability" as defined by the Second Seamen's War Risk Policy, to-wit:

" 'Disability' as that term is used in this Policy means incapacity because of injury proximately caused by the risks insured against herein which necessarily and continuously prevents the insured from performing any and every kind of duty pertaining to his occupation at the time of injury."

and in awarding libelant a recovery for said period.

III. ARGUMENT

The burden of establishing disability as defined in the policy was on libelant. *United States v. Lawson* (C.C.A. 9) 50 F. (2d) 646; *United States v. McPhee* (C.C.A. 9) 31 F. (2d) 243. A mere scintilla of evidence is not sufficient. *United States v. Lawson*, *supra*.

In this case there is not even a scintilla of competent evidence in the record to show that, for the period August 13, 1945 to February 28, 1946, libelant

was disabled within the meaning of the term as defined in the policy. In fact the physical evidence, offered by libelant, affirmatively shows that during all of the time he was gainfully and steadily employed as a junior engineer and oiler aboard the SS TOLOA. He admitted that his services were satisfactory. The most that can be said is that during this period of employment at sea, the work he performed caused him some pain or inconvenience. But, this is not enough. *United States v. Martin* (C.C.A. 5) 54 F. (2d) 554, (Cert. Den. 286 U.S. 546); *United States v. McPhee*, *supra*.

There is no evidence that he worked when really unable and at the risk of endangering his life or health. On the contrary, the only reasonable inference that can be drawn from a consideration of all the evidence is that he did not suffer any ill effects from his employment. There is no evidence that his eventual recovery was in anywise impaired or retarded. The law is settled that in the absence of a showing that one worked at danger to himself the fact of his working may be such as conclusively to negative disability. *Lumbra v. United States*, 290 U.S. 551; *United States v. Diehl*, (C.C.A. 4), 62 F. (2d) 343; *United States v. Harth*, (C.C.A. 8), 61 F. (2d) 541.

In urging upon this Court the proposition that

the lower court erred in awarding libelant a recovery for the questioned period, we are mindful of the rule that though an appeal in admiralty is regarded as trial de novo, the trial court's findings and conclusions supported by competent evidence, will not be disregarded by the appellate court, and if based on conflicting evidence, will not be upset unless manifestly erroneous or clearly wrong, or there is a misapplication of some rule of law. *Lillig v. Union Sulphur Co.*, (C.C.A. 9) 87 F. (2d) 277; *The Mabel*, 61 F. (2d) 537. But as pointed out in our preceding argument there is no competent evidence or reasonable inference to be drawn from the evidence to support the trial court's findings and conclusions. Nor is there any conflict in the testimony regarding the physical fact of libelant's employment during the period in question. Clearly, the court's determination that libelant was disabled within the meaning of the provisions of the policy, is erroneous and wrong. *Crist v. United States War Shipping Administration*, 163 F. (2d) 145. Further, the trial court erred in the application of the law to the undisputed facts in finding and concluding libelant was disabled within the meaning of the term "disability". The contract of insurance provides that the term means incapacity

"which necessarily and continuously prevents the insured from performing any and every kind of

duty pertaining to his occupation at the time of injury”.

If the term as defined in the contract is construed reasonably and due regard is had to the circumstances of this case i.e. employment at sea, (*Lumbra v. United States*, supra) then it follows that the insured (libelant) was not necessarily and continuously prevented from performing any and every kind of duty pertaining to his occupation at the time of his injury.

IV. CONCLUSION

The decree entered herein should be modified and that part thereof allowing libelant a recovery on the insurance contract for disability payments for the period August 13, 1945 to March 2, 1946, should be vacated.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

FRANK PELLEGRINI
Assistant United States Attorney

APPENDIX

Effective and applicable provisions of Second
Seamen's War Risk Policy.

UNITED STATES OF AMERICA WAR SHIPPING ADMINISTRATION SECOND SEAMEN'S WAR RISK POLICY

Crew Life Disability, Loss of Effects and Detention

No.

Date

Total number of men insured for life and injury
..... for \$..... each.

Total amount insured, life or injury \$.....

Rate.....% Premium \$.....

Total amount insured, personal effects \$.....

Rate.....% Premium \$.....

Total amount annual wages and Emergency wages
\$.....

Rate.....% Premium \$.....

Total premium \$.....

In consideration of payment by.....
of a premium of \$....., the War Shipping Ad-
ministration does insure the Master, Officers and
Crew, as hereinafter set forth, of the vessel called
..... during the period described herein

commencing about against loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided), from the perils and causes hereinafter stated, payable in case of claim in funds current in the United States in accordance with the following schedules and as hereinafter stated.

Schedule 1. Loss of life. Master, Officers and Crew, each \$5,000.00.

The amount for which each person is covered by this Schedule is the Principal Sum.

Schedule 2. Disability, including dismemberment and loss of function. For disability proximately caused by the risks and perils insured against herein, and which arises within ninety days from the date of the happening of such risks and perils, and for dismemberment and loss of function caused by the risks and perils insured against herein, and which result from such a disability or otherwise occur within ninety days from the happening of such risks or perils, the Insurer will pay to the insured the benefits set forth in the Stipulations and Conditions.

Schedule 3. Crew effects. For loss of or damage to the personal effects of the Master, Officers or

Members of the Crew proximately caused by the risks and perils insured against herein, the Insurer will pay the amount set forth in the Stipulations and Conditions for the loss of or damage to said effects during the entire period of this Policy as hereinafter set forth, and for the loss of or damage to effects proximately caused by the risks and perils insured against herein, purchased or otherwise acquired during the policy period to replace effects lost or damaged by the risks and perils insured against herein, the Insured will pay not exceeding \$50.00 for each such loss or damage.

Schedule 4. Detention and repatriation benefits. For the detention of the Master, Officers or Members of the Crew during the period covered by this Policy, and under other situations hereinafter provided, the Insurer will pay benefits to the insured or for his or their account as set forth in the Stipulations and Conditions.

This Policy is made and accepted subject to the foregoing and to the Stipulations and Conditions on the following pages which are hereby specially referred to and made a part of this Policy.

In witness whereof, the War Shipping Administration has caused this Policy to be signed by the Administrator, but it shall not be valid unless counter-

signed by or on behalf of the Director of Wartime Insurance.

E. S. LAND,
Administrator.

Countersigned at Washington, D. C., this.....
day of, 194...

.....
Director of Wartime Insurance.

STIPULATIONS AND CONDITIONS

ARTICLE 1. *Persons insured.* The persons insured by this Policy are the Master, Officers and Crew of the vessel described on the face of this Policy. Except as to merchant seamen, membership in the vessel's gun crew shall not of itself constitute an individual a member of the crew of the vessel, as that phrase is used herein. Any person or persons insured under any other or similar policy including the Second Seamen's War Risk Policy, obtained or issued in compliance with the decisions of the Maritime War Emergency Board (issued by the United States Maritime Commission or the War Shipping Administration or otherwise), insuring against loss of life or disability (including dismemberment and loss of function) or loss of or damage to personal effects or de-

tention, including the occurrence of other situation hereinafter provided) shall not, to the extent of such prior coverage, be entitled to coverage under this Policy while such other insurance is in force and effect.

ARTICLE 2. *Additional insurance.* In the event that any person is employed as a Master or Officer or Member of the Crew of said vessel after the commencement of the voyage, the amount of the premium shall be increased proportionately: *Provided, however,* That the failure to pay such additional premium shall not affect the additional coverage.

ARTICE 3. *Risks and perils.* The insurance is for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately caused by risks of war and warlike operations, including capture, seizure, destruction by men-of-war, sabotage, piracy, takings at sea, arrests, restraints and detainments, acts of kings, princes, and peoples in the prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion,

or insurrection, scuttling to prevent capture, aerial bombardment, or, attempts at, or measures taken in defense of, all of the foregoing acts, floating or stationary mines, torpedoes, whether derelict or not, collision caused by failure, in compliance with wartime regulations, of said vessel or any vessel with which she is in collision, to show the usual full peacetime navigation or anchorage lights, stranding caused by the absence of lights, buoys, or similar peacetime aids to navigation consequent upon wartime regulations, stranding caused by the failure of said vessel to employ a pilot in waters where a pilot would ordinarily be employed in peacetime, but in which the employment of a pilot is dispensed with in compliance with military, naval or other governmental orders, or with a view to avoiding imminent enemy attack (for the purposes of the foregoing, the failure to show lights, the absence of lights, buoys, etc., and the failure to employ a pilot shall be presumed to be the cause of the collision or stranding unless the contrary be proved, and stranding shall include sinking consequent upon stranding or contact with any part of the land), collision with another vessel in the same convoy or collision with any military or naval vessel, that is to say, a vessel manned by and under the control of mili-

tary or naval personnel and designed to be employed primarily in armed combat service, stranding, collision or contact with any external substance (including ice, but excluding water), as a result of deliberately placing the vessel in jeopardy, in compliance with military, naval or other governmental orders in order to avoid imminent enemy attack, or as an act or measure of war taken in the actual process of embarking or disembarking troops or loading or unloading material of war.

The fact that a vessel, or any vessel with which such vessel is in collision, is carrying troops or military or other supplies, or is proceeding to or from a war base, or is manned or operated by military or naval personnel, shall not alone be sufficient to include in this policy any claim which is not included by the foregoing terms of this article.

The insurance is also for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately resulting from stranding, sinking, or break-up of the vessel, explosion or fire causing loss of or substantial damage to the vessel, or collision by the vessel or contact with any external substance (including ice, but

excluding water), irrespective of whether the same are caused by risks of war or warlike operations or by marine risks and perils.

The word "vessel" shall include any water-borne conveyance used to transport the insured to and from the vessel on which he is employed, and shall also include any air-borne conveyance used to transport the insured pursuant to instructions or permission of War Shipping Administration or its agents.

ARTICLE 4. *Period of coverage.* The period of coverage for each person covered hereunder is:

From the time such person signs the Articles or enters into a contract of employment for the voyage of the aforesaid vessel, or, if already on Articles for a series of voyages or period of time, from the inception of the aforesaid voyage (i.e., when the vessel is ready to begin the loading of cargo for the aforesaid voyage or to sail in ballast) or, if employed subsequent to the commencement of the voyage, from the time of such employment.

Until such person shall be returned to a place within the continental United States, excluding Alaska, including any period of capture or internment.

Unless sooner terminated by desertion, discharge, accepting employment on another vessel for a purpose

other than to be repatriated, or the refusal without good cause to return to the continental United States, excluding Alaska, from any place outside thereof, in any of which events the coverage under this Policy shall be at an end. (The term "discharge," as used in this paragraph, does not include instances in which the insured leaves the vessel for medical or hospital treatment or for other causes deemed good and sufficient in the opinion of the Administrator.)

ARTICLE 5. *Extension of period of coverage.*
If the insured returns to the continental United States, excluding Alaska, on a vessel which touches or stays at a place or places within the continental United States, excluding Alaska, other than the place of termination of the voyage and the vessel thence proceeds to such place of termination, the period of coverage in respect to each person covered hereunder who continues to be on board such vessel is extended to the termination of the voyage.

* * *

ARTICLE 12. *Disability and dismemberment.*

A. *Disability.* "Disability" as that term is used in this Policy means incapacity because of injury proximately caused by the risks insured against herein which necessarily and continuously prevents the insured from performing any and every kind of duty

pertaining to his occupation at the time of injury.

(1) If an insured suffers disability he shall be paid benefits at the rate of \$150 a month, *Provided, however,* That during any part of such period when the insured is hospitalized he shall be paid benefits at the rate of \$100 a month, beginning with his return to the continental United States, excluding Alaska, until the Administrator determines that the disability has ceased or until a total of \$5,000 is paid, whichever first occurs.

(2) If the Administrator determines at any time during the period such monthly benefits are payable that the insured has received maximum medical treatment for such disability and that such disability is, therefore, permanent in quality (loss of both hands, or both arms, or both feet, or both legs, or both eyes or combination of any two thereof, will be conclusively presumed by the Administrator to constitute a disability permanent in quality), he shall notify the insured of such facts and the insured shall have the option of

(a) continuing to receive such monthly benefits at the rate of \$150 a month or \$100 a month, as the case may be, until the aggregate of all the monthly benefits paid to him both before and after such determination total \$5,000, or

(b) receiving in a lump payment the sum of \$5,000, less the total of the monthly benefits paid to him prior to such determination.

(3) In the event the insured elects after such determination to accept payments for such disability under subdivision (2) (a) hereof and if when the total of \$5,000 has been paid him as therein provided, the insured claims in writing, and establishes to the satisfaction of the Administrator, that because of the same injury he is incapable of performing, for remuneration or profit, any work or engaging in any business or occupation, then he shall be paid further benefits at the rate of \$150 a month or \$100 a month, as the case may be, until the Administrator determines such incapacity has ceased or until a total of \$2,500 is paid, whichever first occurs.

B. *Dismemberment, including loss of function.* If the Administrator determines that the insured, as a proximate result of the risks insured against herein, has suffered a dismemberment or loss of function of the type set forth below, not however, amounting to disability which the Administrator determines to be permanent in quality, the Insurer will pay to the insured additional benefits measured by the following percentages of the Principal Sum. Such benefits shall be in addition to the benefits paid under subdivision

(1), paragraph A hereof, but the aggregate of such benefits for disability, dismemberment, and loss of function shall not exceed the Principal Sum.

(1) *Member lost:* *Per centum*

(a) Arm	65
(b) Leg	65
(c) Hand	50
(d) Foot	50
(e) Eye	45
(f) Thumb	15
(g) First finger	10
(h) Great toe	9
(i) Second finger	5
(j) Third finger	5
(k) Toe other than great toe.....	2½
(l) Fourth finger	2½

(m) Loss of hearing: for complete loss of hearing of one ear, 12½%; for the complete loss of hearing of both ears, 50%.

(n) Phalanxes: for loss of more than one phalange of a digit, the same as the loss of the entire digit; for loss of the first phalange one-half the loss of the entire digit.

(o) Amputated arm or leg: for an arm or leg, if amputated at or above the elbow or the knee, the same as for the loss of the arm or leg: if amputated

between the elbow and the wrist or the knee and the ankle, the same as for the loss of a hand or foot.

(p) Binocular vision or per centum of vision: for loss of binocular vision or for eighty per centum or more of the vision of an eye shall be the same as for loss of the eye.

(q) Two or more digits: for loss or loss of use of two or more digits, or one or more phalanges of two or more digits, or a hand or foot, may be proportioned to the loss of use of the hand or foot occasioned thereby but shall not exceed the payment for loss of a hand or foot.

(r) Total loss of use: for permanent total loss of use of a member shall be the same as for loss of the member.

(s) Partial loss or loss of use: payment for permanent partial loss or loss of use of a member may be for proportionate loss of the member or loss of use of the member.

(t) Disfigurement: proper and equitable payment for serious facial or head disfigurement, not to exceed 50%.

(u) Total or partial loss or loss of use of more than one member or parts of members. In any case in which there shall be a loss or loss of use of more

than one member or parts of more than one member set forth in subdivision (a) to (t) both inclusive, hereof, but not amounting to permanent total disability, payment shall be made for the loss or loss of use of each such member or part thereof, however, not exceeding the Principal Sum, and except that where the injury affects only two or more digits of the same hand or foot, subdivision (q) hereof shall apply.

(2) The amount determined by the Administrator to be due the insured for dismemberment or loss of function shall

(a) if \$750 or less, be paid the insured in a lump sum as soon as practicable.

(b) if more than \$750 be paid, at the option of the insured, in a lump sum or in monthly installments of \$150 a month or \$100 a month, as the case may be, beginning with the month next succeeding the last monthly payment made for disability pursuant to the provisions of subdivision (1), paragraph A hereof, or as soon thereafter as is practicable. The insured shall notify the Administrator in writing of the desired method of payment immediately upon receipt of the Administrator's determination that the insured is entitled to payment for dismemberment or loss of function under this paragraph. Should the Adminis-

trator not receive such written notice within thirty days, it shall be conclusively presumed that the insured desires payment in a lump sum and the Insurer will act accordingly.

(3) If the insured elects under subdivision (2) (b) hereof to accept payment for dismemberment or loss of function in monthly installments, the number of installments due shall be increased in number by 10%, but in no event shall the increase be less than one installment of \$150 a month or \$100 a month, as the case may be.

C. *Injury increasing disability.* The Administrator in determining if disability, dismemberment or loss of function exists, or if found to exist, the quality thereof, will not take previous disabilities, dismemberments or losses of function into account. If, however, such previous condition was insured under the Second Seamen's War Risk Policy, the insured shall receive with respect to the two claims an aggregate sum not less than he would have been entitled to under either subdivision (2) and (3) of paragraph A or paragraph B hereof, had the injuries causing both disabilities been received at the same time.

D. Disability shall not include incapacity directly resulting from bodily or mental infirmity or disease of any kind. Nor shall benefits be paid for dis-

memberment or loss of function directly resulting from bodily or mental infirmity or disease of any kind.

E. If the insured elects after a determination by the Administrator that he is entitled to benefits under either subdivision (2) paragraph A or paragraph B hereof to accept payments for such disability, dismemberment, or loss of function, as the case may be, in installments, and if the insured dies from a cause not insured against herein before he has received the last installment, the remainder which he would have received under such subdivision had he survived shall be paid to the person or persons who would have received his life insurance hereunder, subject, however, to all the conditions, stipulations, and provisions contained in this Policy governing the disposition and payment of the insurance for loss of life.

The right of the insured to payment of the benefits provided for herein shall be conditioned upon his or her being alive to receive payment, and benefits shall not be paid to the heirs, executors, or administrators of the insured, or of any other person.

UNITED STATES OF AMERICA, *Appellant,*
vs.
BENJAMIN W. MCNAIR, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

BASSETT & GEISNESS,
Proctors for Appellee.

811 New World Life Building,
Seattle 4, Washington.



Appellant,

VS.

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
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INDEX

	<i>Page</i>
Summary of Argument.....	1
Argument	1
Applicable Clause of Policy.....	1
Interpretation of Policy	2
Evidence as to Disability.....	2
Appellee Was Disabled Until August 15, 1947, from Performing "Any and Every Kind of Duty Pertaining to His Occupation" Under Applicable Legal Tests	6
Conclusion	10

TABLE OF CASES

<i>Daranovich v. U.S.</i> , 73 Fed. Supp. 1004 (D.C., N.Y. 1947)	2
<i>Kuhnle v. Department of Labor & Industries</i> , 12 Wn.(2d) 191	9
<i>Mutual Life Insurance Co. v. Brunson</i> , 20 So. (2d) 214 (Ala. 1944).....	8
<i>Seaman v. New York Life Insurance Co.</i> , 115 P. (2d) 1005 (Mont. 1941).....	8
<i>Storwick v. Reliance Life Insurance Co.</i> , 151 Wash. 153	9
<i>Straw v. U.S.</i> , 62 F.(2d) 757 (C.C.A. 9, 1933)....	2
<i>Sutton v. U.S.</i> , 73 Fed. Supp. 996 (D.C., Cal. 1947)	2
<i>The Advance</i> , 43 F.(2d) 824 (C.C.A. 2nd, 1930) ..	10
<i>The Redwood and Sun-d'E.</i> , 81 F.(2d) 680 (C.C.A. 9th)	10
<i>U.S. v. Patryas</i> , 303 U.S. 341, 58 S. Ct. 551, 82 L. ed. 883 (C.C.A. 9, 1938).....	2
<i>Wright v. Prudential Insurance Co.</i> , 80 P.(2d) 752 (Cal. 1938).....	9

In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, <i>Appellant</i> ,	}	No. 12121
vs.		
BENJAMIN W. MCNAIR, <i>Appellee</i> .		

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

SUMMARY OF ARGUMENT

Appellee is entitled to benefits if disabled from working in the occupation in which he was engaged at the time of injury. The proof shows that such disability existed until August 15, 1947. During that period appellee could do light work, but he tried and found himself unable to perform the usual duties of his occupation at the time of injury. The trial court did not err in allowing benefits until March 2, 1946, but should have allowed benefits for the further period from March 2, 1946, to August 15, 1947.

ARGUMENT

Applicable Clause of Policy

One clause of the policy sued upon, set forth in full in the appendix to appellant's brief, provides for benefits in the event of "incapacity because of injury * * *

which necessarily and continuously prevents the insured from performing any and every kind of duty pertaining to his occupation at the time of injury." This is the clause under which the trial court made its award.

Another clause of the policy provides for benefits in the event of disability from "performing for remuneration or benefit, any work or engaging in any business or occupation." In the latter case the rate of payments are the same but the maximum total amount is then \$7500.00 instead of \$5000.00. Both of these provisions are contained in Article XII(A) of the policy (Appellant's brief, Appendix IX, *et seq.*).

INTERPRETATION OF POLICY

The Second Seamen's War Risk Policy sued upon here is to be liberally interpreted in favor of the seaman, *Daranovich v. U.S.*, 73 Fed. Supp. 1004 (D.C., N.Y. 1947); *Sutton v. U.S.*, 73 Fed. Supp. 996 (D.C., Cal. 1947). The last case cites *Straw v. U.S.*, 62 F. (2d) 757 (C.C.A. 9, 1933) and *U.S. v. Patryas*, 303 U.S. 341, 58 S. Ct. 551, 82 L. ed. 883 (C.C.A. 9, 1938).

EVIDENCE AS TO DISABILITY

Appellee called Dr. Hunter J. McKay, a highly trained neuro-surgeon, formerly with the Mayo Clinic (Aps. 26). Doctor McKay testified that he examined appellee August 15, 1947 (Aps. 26). At that time appellee complained that following his shrapnel wound he developed a pain at about the site of the entrance of the shrapnel and that this was aggravated by any type of strain, such as lifting, pulling, etc. Examina-

tion disclosed that there was injury to the brachial plexus (Aps. 28). X-rays showed that the shrapnel had necessarily damaged it (Aps. 29). The brachial plexus consists of a number of nerves that have come from the spinal cord into the neck region and function to enervate the arm (Aps. 28). The plexus is the junction point of the nerves at the base and side of the neck, and from the plexus the nerves ramify down the arm (Aps. 27 and 29). The injury to the plexus was evidenced by an appreciable diminution of the reflexes in certain of the muscle groups and by patchy loss of sensation throughout the arm. The reflex of the triceps muscle in the forearm was virtually absent (Aps. 28). At that time the doctor was of the opinion that appellee had sustained a definite injury to his brachial plexus (Aps. 30).

The injury handicapped appellee for physical labor. This handicap would be evidenced in any activity that caused him to strain the muscles of the right shoulder or the right arm. This would cause pain. In addition, there was a slight diminution of strength in the entire right arm and the motor function being impaired by the injury to the brachial plexus, his dexterity in use of his right arm was impaired (Aps. 32). His right arm is his major arm (Aps. 52). At that time (August 15, 1947) appellee could have engaged in hard manual labor only "with extreme difficulty and suffering" (Aps. 32).

At the time of this first examination, August 15, 1947, Doctor McKay believed that there was no definite treatment indicated and that the condition might improve or that it might get worse (Aps. 32-33). Doc-

tor McKay saw appellee again on April 19, 1948, the day before the trial commenced. He found that the condition had fortunately improved and that the impairment of reflexes and strength had virtually disappeared and that there was no present evidence of muscle shrinkage. The former impairment of muscle sensation was also much improved (Aps. 33).

The doctor said that the condition of appellee's reflexes in August, 1947, is something that can be objectively determined so the doctor need not rely entirely on the patient's statements to him (Aps. 33). As stated by appellant, Doctor McKay estimated the permanent partial disability as 10% of the disability resulting from amputation of the arm at the shoulder (Aps. 35) and appellant does not question the award based on that estimate.

At the time of the trial the piece of shrapnel was still embedded in the soft tissues of appellee's shoulder but the doctor did not believe that it should be removed (Aps. 40).

At the time of his injury appellee was a fireman and water-tender on a merchant ship. He was 21 years of age at the time of trial (Aps. 47). On December 28, 1944, a suicide plane dove into his ship and he sustained the wound in question (Aps. 47-48). Appellee's arm was at first very numb so that he could not even lift it or manipulate it. As time went on he regained use of his arm but continued to have trouble mostly "in lifting or—well, it was just in general work that I had trouble with it" (Aps. 50-51).

Because of the trouble he had with his arm, appellee

went to the Marine Hospital on April 9, 1945 and was treated as an out-patient until May 22, 1945 (Aps. 50). Appellee had returned to the United States March 2, 1945 (Aps. 49) and between that time and the time he reported to the Marine Hospital he attempted to do some gardening and orchard work for hire but "it was just a little too much for my arm" (Aps. 52).

On August 13, 1945 appellee obtained a job on the S.S. TOLOA as oiler in the engine room (Aps. 53-54). He voluntarily left the work because it was too much for him (Aps. 54). There was some confusion as to the period of service on the TOLOA but he evidently was on the ship more or less continuously from August 13, 1945 until December 24, 1945 and sometime in January and February, 1946 (Aps. 91-92), probably from January 10th until February 28, 1946 (Aps. 84).

He thereafter sought and obtained employment as a waiter on the S.S. BARANOF and made one trip to Alaska working in that capacity (Aps. 55); this trip took about 27 or 28 days (Aps. 56).

Appellee testified as follows (Aps. 56):

Q. (By Mr. Geisness): Since you left the BARANOFF, have you ever again gone to sea?

A. No, sir.

Q. Why is that?

A. Well, sir, I tried it that last time and I just decided to give it up.

Q. Why did you decide to give it up?

A. Because I couldn't stand my own job in the engine room, because I belonged to the black gang

in the first place and that BARRANOFF job was a temporary job.

Q. Did you have the proper papers to continue the job like you had on the BARRANOFF?

A. No, sir.

Q. Why couldn't you go back on the black gang and do blackgang work?

A. Like I told you, it was just too much heavy work."

About a month or so after appellee left the BARANOFF, he helped his father and brother around home and with mechanical work and he tried apple picking in September, 1947 but even at that late date he was required to leave because carrying a heavy sack around his neck gave him quite a bit of trouble (Aps. 56-57).

This, the proof shows that "black gang" work is heavy work, appellee tried it and found that he could not carry it on and Doctor McKay testified that in August 15, 1947 appellee was not able to carry on heavy work.

**APPELLEE WAS DISABLED UNTIL AUGUST 15, 1947
FROM PERFORMING "ANY AND EVERY KIND OF
DUTY PERTAINING TO HIS OCCUPATION" UNDER
APPLICABLE LEGAL TESTS.**

The governing legal tests are well stated in 29 Am. Jur. Sec. 1161, page 872:

"The rule prevailing in most jurisdictions is that the 'total disability' contemplated by a sickness or accident insurance policy, or the disability clause of a life insurance policy, does not mean,

as its literal construction would require, a state of absolute helplessness, but contemplates rather such a disability as renders the insured unable to perform all the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner. The fact that the insured is able to perform some inconsequential, trivial, or incidental duties connected with his usual employment or occupation does not preclude recovery under a total disability provision; neither does the fact that the insured may be able for an inappreciable period of time to perform his accustomed labor prevent a recovery, where he is actually totally disabled from following any avocation. Nor do futile attempts to carry on one's business or occupation disprove total disability. Furthermore, if, by reason of an injury insured against, the insured actually loses time from his business, he is entitled to recover the money value thereof, although his salary is continued during his disability, where, under the policy, he has a right to be indemnified against the loss of the money value of his time during disability arising from accident; the indemnity is against loss of earning power and not against loss of income.

“As a corollary or extension of the foregoing general rule, the view is taken in some cases that disability to substantially perform the duties of the insured's occupation, or an illness which, in the exercise of common care and prudence, requires him to desist in order that a cure may be effected, is ‘total disability’, and the fact that the insured may or did do some work or transact some business duties does not preclude the existence of total disability at the time, if reasonable

care and prudence require that he desist, or if he in fact is totally unfit to work.”

Under the foregoing tests we respectfully submit that appellee was not only disabled to March 2, 1945, the date established by the trial court as the termination of disability but was disabled up until the time Doctor McKay examined him in August, 1947.

Appellant’s argument really boils down to the contention that appellee could not have been disabled from “black gang” work because he actually engaged in that work for a period of several months. However, as indicated in the foregoing quotation from American Jurisprudence the fact that he actually engaged in the work is not conclusive. Here he finally had to give it up.

The rule is stated in *Mutual Life Insurance Co. v. Brunson*, 20 So.(2d) 214 (Ala. 1944):

“But if he received compensation for work which he did not perform or which he performed in a way which did not justify the compensation he received or any other substantial sum, it cannot be said that he was substantially performing the material duties of a gainful occupation. Or if he had not the physical or mental ability to carry on a gainful occupation in its substantial features with the skill and accuracy which such business required in the usual and customary manner, his attempt to do so for compensation and his continuing effort at it is not conclusive that he was not totally disabled.”

An apt comment is quoted in *Seaman v. New York Life Insurance Co.*, 115 P.(2d) 1005 (Mont. 1941):

“The rule is well established that ‘total dis-

ability' within the meaning of insurance policies does not necessarily mean utter helplessness, nor inability to perform any task, or even on some occasions, usual tasks for a limited period. * * * To hold otherwise would be to penalize every effort of an injured or sick person to rehabilitate himself and thus incidentally relieve the insurance carrier.' "

It is well established, as indicated by the foregoing, that an insured is not precluded from recovering because he actually engaged in his occupation if common care and prudence required him to do otherwise (*Wright v. Prudential Insurance Co.*, 80 P.(2d) 752, (Cal. 1938) and authorities cited). And the same thing should certainly be true where pain does not reasonably permit work actually attempted and temporarily performed. Here, appellee was disabled by pain and weakness.

One of our Washington cases has been cited many times and contains probably as good a definition of total disability to engage in *any* occupation as may be found anywhere. In this case, *Storwick v. Reliance Life Insurance Co.*, 151 Wash. 153, the court said:

"It seems to us that one is totally disabled, within the meaning of these policies, when he is so far disabled that he cannot, with any degree of success, within the range of his normal capabilities, earn wages or benefit in some occupation or gainful pursuit."

Under this definition a person is disabled when he can only work occasionally or intermittently and his capacity is much limited, *Kuhnle v. Department of Labor & Industries*, 12 Wn.(2d) 191.

It can scarcely be said that the trial court's finding that there was disability for the period from August 13, 1945 to March 2, 1946 was without evidentiary support and manifestly erroneous.

It has been said that the findings of fact will not be disturbed unless clearly contrary to and in utter disregard of the evidence (*The Redwood and Sun-d'E*, 81 F.(2d) 680 (C.C.A. 9th) and the opinion of the trial court on opinion evidence is especially persuasive (*The Advance*, 43 F.(2d) 824 (C.C.A. 2nd, 1930)). What seems to appellee unjustified is the trial court's finding that benefits should cease March 2, 1946. Under the applicable legal tests benefits should be paid for the additional period from March 2, 1946 to August 15, 1947.

CONCLUSION

For the foregoing reasons we respectfully submit that the trial court's finding of disability extending to March 2, 1946, should not be disturbed. We further respectfully submit that the decree of the trial court should be modified to grant recovery for the period from March, 2, 1946 to August 15, 1947.

Respectfully submitted,

BASSETT & GEISNESS,

Proctors for Appellee.

